# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1916

No. 9[redacted]

22

TALBOT DARBY BRAGG, PLAINTIFF IN ERROR,

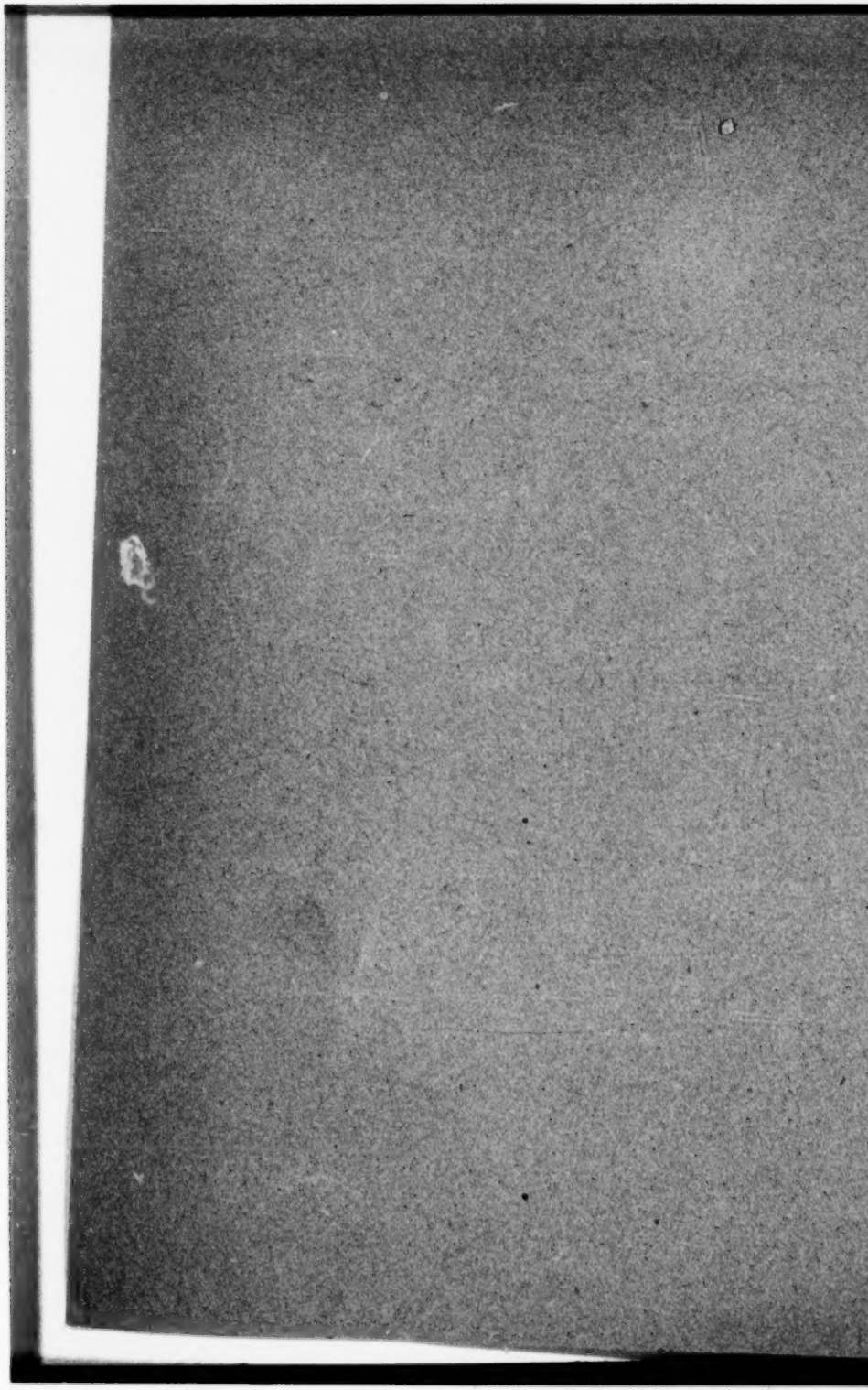
vs.

R. S. WEAVER AND H. FLIPPIN.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED FEBRUARY 13, 1917.

(25,765)



(25,765)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1916.

# No. 935.

---

TALBOT DARBY BRAGG, PLAINTIFF IN ERROR,

*vs.*

R. S. WEAVER AND H. FLIPPIN.

---

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

---

INDEX.


| | Original. | Print |
|---|---|---|
| Petition | 1 | 1 |
| Judgment | 12 | 5 |
| Transcript of record from the circuit court of Lunenburg county. | 13 | 6 |
| Petition for temporary restraining order | 13 | 6 |
| Injunction order | 17 | 8 |
| Answer | 19 | 9 |
| Decree | 23 | 11 |
| Judge's certificate of evidence | 24 | 11 |
| Testimony of J. T. Waddill | 24 | 12 |
| T. D. Bragg | 25 | 12 |
| R. S. Weaver | 25 | 12 |
| Victor von Gemmingen | 28 | 13 |
| Resolution of board of supervisors of Lunenburg county. | 30 | 14 |


---

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 27, 1917.

| | Original. |
|---|---|
| Judge's certificate | 30 |
| Agreement of counsel as to evidence | 31 |
| Clerk's certificate | 32 |
| Certificates to record | 33 |
| Assignment of errors | 34 |
| Petition for writ of error | 35 |
| Order allowing writ of error | 36 |
| Writ of error | 36 |
| Certificate of lodgment | 37 |
| Bond on writ of error | 37 |
| Citation and service | 39 |
| Clerk's return to writ of error | 40 |

1 In the Supreme Court of Appeals of Virginia, at Richmond.

T. D. BRAGG

vs.

R. S. WEAVER and H. FLIPPIN.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, T. D. Bragg, respectfully represents that he is greatly aggrieved by a final decree of the circuit court of the county of Lunenburg, entered on the 14th day of October, 1916, in a certain suit in chancery therein pending, wherein your petitioner was complainant and the said R. S. Weaver and H. Flippin were defendants. A transcript of the record in the said cause is herewith filed and prayed to be read in connection and as a part of this petition.

The decree of which your petitioner complains was a final decree dissolving an injunction, which had been previously awarded, and dismissing the bill of your petitioner, with costs to the defendants.

A copy of the proceedings in the lower court in this cause were presented to the judges of this court, along with an application
2 for an injunction, as provided for in section 3438 of the Code of Virginia, and the injunction was denied. The object of this petition is to secure a ruling of this court on a petition for an appeal.

*Statement of the Case.*

On the 12th day of October, 1916, your petitioner presented to the Circuit Court for the county of Lunenburg (said court then being in session) an application for an injunction, alleging that your petitioner was the owner of a very valuable tract of land comprising about eighty acres, just outside of the corporate limits of the town of Victoria, and adjoining the Public Road leading from Victoria to Lunenburg Court House; that of this tract of land there were about four or five acres which he had selected as a residence site, upon which he expected to build a handsome residence; that the soil on the entire eighty acres, and especially the four or five acres, is very fertile; that on Thursday October 12th, 1916, without the knowledge or consent of your petitioner, one R. S. Weaver and H. Flippin, with a large force of employees, wagons, team- etc. entered upon the said tract of land, and especially the four or five acres, and began to dig up
3 and remove the top soil therefrom, to the serious injury of the said land; that your petitioner requested them to cease their trespassing, but that they paid no attention to said requests.

A temporary injunction was awarded in accordance with the prayer of the bill, which by agreement of counsel, remained in force until the morning of the 14th day of October, 1916, when the defend-

ants moved to dissolve, and in support of their motion, filed their answer, setting forth, in substance, as a cause for the alleged trespass and removal of soil, that they were independent contractors, engaged in resoiling the public road in Plymouth Magisterial District, Lunenburg County, leading from Victoria to Lunenburg Court House; that the contract was let by the Permanent Road Improvement Board of said Plymouth District, whose duty it is to furnish all soil and other materials for the improving of said road, and which has the right under the laws of this state to take from adjoining lands such soil and materials as they desire for the repairing of said road; that said Road Board had employed one Victor von Gemmingen and had authorized and empowered him, as their agent, to select such soils and materials as he might deem best for the repairing of the said road;

4 that the said V. von Gemmingen, acting under this authority delegated to him by the said Road Board, had designated the lands of your petitioner in question from which soil might be removed for the purpose of repairing said road, and that the said defendants, by virtue of such authority, had entered upon the lands of the plaintiff and commenced to remove his soil as set forth in the application for the injunction.

After hearing, ore tenus, the testimony of your petitioner, T. D. Bragg, Jas. T. Waddill, member of the Board of Supervisors from Plymouth District, and as such chairman of the Plymouth District Maintenance Road Board, the defendant, R. S. Weaver and V. von Gemmingen (none of which denied any of the material allegations of either the bill or the answer) the court dissolved the injunction and dismissed the bill. The substance of the testimony of said witnesses is hereinafter set forth in narrative form.

*The Law of the Case.*

The defendants rely upon section 944*a*, Pollard's Code (1904), clauses twenty one and twenty two, the Acts of the General Assembly, 1912, page 308, Acts of Assembly, 1914, p. 280, and the Acts of 1916, p. 497, as authority for the action of the defendants in depriving your petitioner of his property.

5 Section 944*a* of the Code, clause twenty-one, says, among other things, in reference to the authority of the Superintendents of roads, that "he may take from the most convenient lands so much wood, stone, gravel or earth as may be necessary to be used in constructing or repairing any road etc." Clause twenty-two says that if the owner of said land shall think himself injured thereby, and he and the superintendent of roads cannot agree upon the damages, a justice, upon application to him, shall issue a warrant to three free-holders, requiring them to view the lands from which such materials are taken and assess the damages and report the same to the Board of Supervisors, with the right of either party to appeal from the decision of the board.

The Acts of Assembly of 1912 provide for the submitting to the qualified voters of the several magisterial districts in Lunenburg

county, the question as to the issuance of bonds by such magisterial district for the construction and repair of the public roads of the various districts; and in addition provides for the handling of funds derived from such bond issues, a board "consisting of five free-holders, of each magisterial district, to be selected and appointed by the judge of the circuit court of Lunenburg county in term time or vaca-
6 tion, who before entering upon the duties of their office should execute bonds payable to the Board of Supervisors of Lunenburg County in such amounts and with such security as may be approved by said court or judge, and conditioned for the faithful performance of their duties as such commissioners under such appointment, and to account for all of said funds which may come into their hands, said board so appointed to be known as the road board of the magisterial district for which they were appointed." They were authorized to make contracts etc.

The Acts of Assembly of 1914, p. 280, provides for "a road board in each magisterial district composed of the supervisor of the district and two commissioners *or* roads, who shall be selected by the people, at the same time that the supervisors of the county are selected, and shall hold office for four years; and shall have all the rights, powers and authority as are given to the superintendents of roads under the general laws of the state etc."

The Acts of the General Assembly of 1916, p. 497, says that "the Road construction Board of Plymouth Magisterial District of Lunenburg County is hereby authorized to expend as follows, such unexpended balance as may remain in the hands of the said board after the completion of all the roads indicated in the said court order, to-wit: First; in resoiling and reimproving permanently the
7 public road leading from the Town of Victoria in the direction of Lunenburg Court House to the line of the Lewiston Magisterial District etc."

Defendants contend that by virtue of the section of the Code and the Acts aforesaid, they were within their rights in taking your petitioner's property, as set forth in his bill for an injunction.

It will be readily seen that section 944*a* only undertakes to invest superintendents of roads with the authority to take soil, materials etc. for the construction and repair of public roads. While the Acts of 1914, above referred to, undertake to invest "the road board in each magisterial district composed of the supervisor of the district and two commissioners, who shall be elected by the people," with the same powers as road superintendents under section 944*a*, this Act cannot possibly have reference to the board referred to by the Act of 1916, which was merely authorized to expend the money, and which is the board under whose authority the soil was taken. The last mentioned board is appointed by the judge, while the board which the Act of 1914 undertake to invest with the authority of road superintendence is elected by the people. Neither the Act of 1912, nor the Act of 1916, nor section 944*a* of the Code undertakes to invest in this
8 board any power to take soil and other materials from the lands of others for use in the construction and improvement of

roads—and this board having no right itself to take such soil and materials, could not invest authority to do so in V. von Gemmingen and through him in the defendants.

But granting, for the sake of argument, that the section of the Code and the Acts referred to undertake to invest in the Board which actually exercised the power such rights as are here contended for, then, in that event, they are violative of the due process clause of the Federal Constitution, because they make no provision for notice to the land owner, and afford him no opportunity whatever to contest the legality, justice or correctness of the taking.

The fundamental idea of due process of law is the opportunity to be heard before property is taken. Violet v. Alexandria, 92 Va. 561. Judge Caldwell, speaking for the court in that case, says: "In Cooper v. Board of Public Works, 108 E. C. L. 181, involving the action of the Board of Public Works, in pursuance of a statute which did not require notice, Willis, J., said: 'I apprehend that a tribunal which is, by law, invested with power to affect the property of one of her majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds. And that rule is of
9 universal application, and founded upon the plainest principles of justice.'"

In the case of Lovett v. West Virginia Central Gas Company, 65 S. E. 196, in one of the headnotes to the case, we find the law stated as follows:

The right of an individual to the use and enjoyment of his lands can in no wise be made to give way to public use and convenience, except in obedience to the constitutional provision forbidding the taking of private property for such uses before payment of just compensation.

See also Norfolk v. Young, 97 Va. 728; and Michie's Digest U. S. Supreme Court reports, vol. 5, page 641 and vol. 12, page 516, and cases cited.

Further citation of authority seems unnecessary. As was said in Garfield v. Goldsby 211 U. S. 249, citing Garfield v. Allison, 211 U. S. 264,

The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded, is of the essence of due process of law. It is unnecessary to cite the decisions in which this principle has been repeatedly recognized.
10 It is enough to say that its binding obligation has never been questioned in the federal supreme court.

Your petitioner earnestly submits that his bill should not have been dismissed; that instead the injunction previously awarded him should have been enlarged and perpetuated, and that he should have been permitted to prove his damages already sustained and allowed to recover the same.

For these and other errors apparent on the face of the record, your petitioner prays that an appeal and supersedeas may be awarded to him, and that the decree complained of may be reviewed and re-

versed by this Honorable Court. And, as in duty bound, he will ever pray etc.

T. D. BRAGG,
*By Counsel.*

GEO. E. ALLEN,
H. C. GREGORY,
*Counsel.*

VIRGINIA,
*Lunenburg County, To-wit:*

I, Geo. E. Allen, attorney at law practising in the Supreme Court of Appeals of Virginia, do certify that in my opinion the decree complained of in the foregoing petition should be reviewed
11 by the said Supreme Court of Appeals.

GEORGE E. ALLEN.

Received December 18, 1916.
Refused.
R. R. P.
S. G. W.
G. M. H.
J. L. K.
F. W. S.

Received January 2, 1917.
H. S. J.

12 VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building in the City of Richmond, on Thursday, the 4th Day of January, 1917.

The petition of T. D. Bragg for an appeal from and supersedeas to a decree pronounced by the circuit court of Lunenburg county on the 14th day of November, 1916, in a certain suit in chancery then therein depending, wherein the said petitioner was complainant and R. S. Weaver and H. Flippin were defendants, having been heretofore refused by each of the Judges in vacation, the petitioner under section 3466 of the Code, tendered in open court his petition for said appeal and supersedeas, and the court having maturely considered the petition aforesaid and the transcript of the record of the decree having been seen and inspected, the court doth reject said petition and refuse said appeal and supersedeas, the effect of which is to affirm the decree of the circuit court of Lunenburg county.

A copy.
Teste:—

H. STEWART JONES, *C. C.*

13 VIRGINIA:

In the Circuit Court of the County of Lunenburg.

Pleas before the circuit court of the county of Lunenburg, at the Court House thereof, on the 14th day of October, 1916, in a certain suit in chancery therein pending, wherein T. D. Bragg was complainant and R. S. Weaver and H. Flippin were defendants.

Be it remembered that heretofore, to-wit, in open court on the 12th day of October, 1916, came T. D. Bragg, by counsel, and presented his bill for an injunction against the said defendants, R. S. Weaver and H. Flippin, which bill is in the following words and figures, to-wit:

In the Circuit Court of Lunenburg County.

T. D. BRAGG, Petitioner,

v.

R. S. WEAVER and H. FLIPPIN, Defendants.

*Petition for Temporary Restraining Order.*

To the Honorable Judge of the said Court:

Your petitioner, T. D. Bragg, a citizen and property owner of the town of Victoria, in the county of Lunenburg, Virginia, humbly complaining, showeth unto your Honor, the following case:

(1) That your complainant who is a citizen of the town of
14 Victoria in the County of Lunenburg, Virginia, is seized and possessed of the present ownership of a tract or parcel of land containing about eighty acres (80), adjoining the public road from Lunenburg Court House to Victoria; situated just outside of the corporate limits in a westerly direction from the said town of Victoria, which is in the Plymouth Magisterial District and hence said land is in close proximity to the streets and roads of said town. Said land is bounded as follows. On East by Public Road leading from Lunenburg Court House to Victoria; on North by the lands of J. C. Beach; on the West by the lands of T. D. Bragg; and on the South by the lands of T. D. Bragg; said land is across the said road opposite the lands of E. J. Flippo and is a portion of the Bragg Residence Site; plat duly recorded in the Clerk's Office of Lunenburg County.

(2) That the whole tract or parcel of land is very fertile and hence of great value for farming purposes, and, in addition to its value as farm land, it is also very valuable as town lots, bein- immediately outside of the corporate limits of the town of Victoria, which is a rapidly growing town of a present population of 2,500 inhabitants.

(3) That on the 12th day of October, 1912, the said R. S. Weaver and H. Flippin and without the knowledge or consent of your
15 petitioner and without making any attempt to make a contract for this land of your petitioner, the said defendants en-

tered upon the said tract of land with a large force of men, and then and there the said defendants with their servants, employees, and divers horses, mules, plows, wagons, carts and other vehicles, and proper tools and implements began to cut, tear up, plow and carry away from a depth of from one to five feet of the soil of your complainant, and that the said defendants are at this time still plowing, removing and carrying away the soil from the said land, and from all appearances they will continue to do so indefinitely, unless sooner stopped by an injunction.

(4) As soon as your complainant heard of the actions of the said defendants he had an interview with the said R. S. Weaver and H. Flippin and was assured by them of their intention to continue taking and removing said soil in said manner.

(5) That, if the said defendants continue their said acts and operations on the said land of your petitioner as is their manifest intention, they will remove large quantities of the fertile topsoil, will excavate and leave holes, ditches, and the like on the said land and cut the same up with wagons implements and the like, thus
16 permanently injuring the inheritance and greatly depreciating the value of the said lands, and your petitioner will thereby suffer irreparable injury that cannot be compensated in damages in an action at law.

(6) That in view of the foregoing conditions, your petitioner believes and charges that immediate and irreparable loss or damage will result to him before the matter can be heard on notice of this application for an injunction, or restraining order. Forasmuch therefore as these doings are contrary to equity and good conscience, and as your complainant is without adequate remedy at law in the premises, he comes into this court of equity, where matters of this sort are properly cognizable, and prays that the said R. S. Weaver and H. Flippin, be made parties to this bill and required, but not on oath, to answer the same; and that the said defendants be temporarily enjoined and restrained from removing the said soil of the said plaintiff off the said land, and digging holes and excavating in his said land and trespassing or entering thereon personally or by their agents or servants; that plaintiff be decreed damages for injuries already sustained because of the acts aforesaid; and for such other further and general relief in the premises as the nature of his case
17 may require or to equity and good conscience shall seem meet.

And your petitioner will ever pray etc.

T. D. BRAGG,
*By Counsel.*

GEORGE E. ALLEN &
H. C. GREGORY,
*For Petitioner.*

STATE OF VIRGINIA,
*County of Lunenburg, To wit:*

This day came T. D. Bragg, the petitioner in the above bill, who made oath that the matters and things set forth in said bill, so far as he makes them of his own knowledge, are true, and so far as made on information of others, he believes them to be true.

Given under my hand this 12th day of October, 1916.

H. C. GREGORY, *N. P.*

My commission expires September 20th, 1920.

And thereupon the following order was then and there entered:

VIRGINIA:

In the Circuit Court for the County of Lunenburg.

T. D. BRAGG

vs.

R. S. WEAVER and H. FLIPPIN.

*Injunction Order.*

18 This day came T. D. Bragg, by counsel, and presented his bill for a temporary restraining order, praying an injunction against R. S. Weaver and H. Flippin, enjoining them from removing dirt, top-soil etc. and otherwise trespassing upon the lands hereinafter mentioned and described; and was argued by counsel.

Upon consideration whereof, and it appearing that said bill is duly sworn to, and that the defendants are trespassing upon the said lands of the plaintiff as set out in said bill, and that unless restrained from so doing, the said plaintiff will suffer irreparable injury that cannot be compensated in damages at law, the court doth adjudge, order and decree that the said defendants, R. S. Weaver and H. Flippin, together with all their employees, agents, factors and servants be, and they hereby are restrained and enjoined from further trespassing upon the said lands of the plaintiff, and from removing any top-soil or dirt therefrom, to-wit; that parcel or tract of land containing about eighty acres, in Plymouth Magisterial District, lying on the west side of the Public Road leading from Victoria to Lunenburg Court House, situated just outside the corporate limits of the town of Victoria, across the road from the lands of E. J. Flippo, and

19 is the same property that is set forth in a plat of the lands designated as the Bragg Residence Site, duly of record in Lunenburg Circuit Court Clerk's Office.

The said defendants and their agents and servants are enjoined as aforesaid until the 13th day of October, 1916, at which time this injunction order shall expire unless sooner enlarged.

But this injunction shall not be effectual until the plaintiff, or some

one for him, shall have entered into a bond before the clerk of this court in the penalty of $150.00, conditioned and payable according to law, and with security approved by the clerk.

And thereupon came the defendants on the 14th day of October, 1916, and filed their answer, which is in the following words and figures, to-wit:

In the Circuit Court of Lunenburg County, Va.

T. D. BRAGG

v.

R. S. WEAVER and H. FLIPPIN.

*Answer of R. S. Weaver and H. Flippin.*

To the Honorable William R. Barksdale, Judge of the said Court:

Your respondents, R. S. Weaver and H. Flippin, saving and reserving to themselves all just exceptions to the bill of complaint filed against them in this cause by T. D. Bragg, for answer to the said bill of complaint or so much thereof as they are advised, it is
20 material for them to answer, answer and say:

First.

That they admit the allegations contained in paragraph one of the said bill of complaint.

Second.

That they neither admit or deny the allegations contained in paragraph two of the said bill or complaint, but call for strict proof of the same.

Third.

That your complainants are contractors building and repairing the public road, extending from the town of Victoria toward Lunenburg Court House; that they are employed by what is known as the Permanent Road Improvement Board of Plymouth Magisterial District, of which said board, Dr. E. L. Kendig is Chairman and Mr. E. L. Gee is Secretary; that in the construction of public roads and for that particular road in the said Magisterial District the soil and materials are furnished by the said road board which has the right under the laws of this state to take soil and other materials necessary for roads from any tract or tracts of land in the said county of Lunenburg; that the said Permanent Road Improvement Board is expending money in the improvement of the said road and particu-
21 larly of the said road upon which your respondents are now working, derived from money from the sale of bonds for the per-

manent improvement of the roads in the said Plymouth Magisterial District of Lunenburg County, Virginia; that the said Road Board authorized, empowered and employed one Victor von Gemmingen who is also the representative of the State Highway Commission, under whose supervision the said road is being built, to act for them as their agent and invested by the said Permanent Improvement Road Board with all their power and authority to take such soils and materials as they may deem necessary for the building and repairing of the said road, from convenient and suitable tracts of land; that the said Victor von Gemmingen acting under and by his authority so delegated to him as aforesaid by the said Permanent Improvement Road Board of Plymouth Magisterial District, designated and pointed out this particular tract of land mentioned in the said bill of complaint and this particular spot whereon and from which they, your respondents, should take the soil for the repairing, constructing and improving of the said road, that your respondents would not have taken the said soil unless they had been so authorized and empowered by the said Victor von Gemmingen, and through him by the said Permanent Improvement Road Board of the said District of
22 Plymouth; that according to their contract with the said Permanent Road Board of the said district of Plymouth, the said Road Board has to furnish for the said building, improvement and repairing of the said road, the said soil and materials as may be needed and designated by the said Victor von Gemmingen.

## Fourth.

That each and every allegation of the said bill of complaint not hereinabove denied is here denied, as completely and fully as if the same had been denied separately.

That therefore your respondents pray that the said injunction heretofore granted against them enjoining and restraining them from removing the soil from the said tract of land in the said bill of complaint mentioned and described may be dissolved.

And now having fully answered, your respondents pray to be hence dismissed with their reasonable costs in this behalf expended.

R. S. WEAVER &
H. FLIPPIN,
*Respondents.*

And now at this day, to-wit, on the day and year first herein mentioned, the following decree was entered:

VIRGINIA:

In the Circuit Court for the County of Lunenburg.

23 T. D. BRAGG

v.

R. S. WEAVER and H. FLIPPIN.

*Decree, Oct. Term, 1916.*

This cause came on this day to be heard on the bill of the plaintiff, and the exhibits filed therewith; the answer of the defendants and the exhibits filed therewith, and the evidence of witnesses duly taken in open court, and was argued by counsel:

Upon consideration whereof, the court doth adjudge, order and decree as follows:

1.

That the injunction heretofore granted in this cause enjoining and restraining the defendants R. S. Weaver and H. Flippin, together with all their employees, agents, factors, and servants from trespassing upon the lands of the plaintiff, and from removing top-soil and dirt therefrom, which said tract of land is fully described in the said bill be, and the same is hereby dissolved.

2.

That this cause be, and the same is hereby dismissed from the docket of this court, and the plaintiff, T. D. Bragg, is hereby directed to pay the costs of this suit.

24 3.

The operation of this decree is hereby suspended until 6 o'clock A. M. on the 17th day of October, 1916, conditioned upon the plaintiff or some one for him entering into bond in the sum of $300.00, with security approved by the Clerk of this Court, this the 14th day of October, 1916, conditioned according to law.

*Judge's Certificate of Evidence.*

The following evidence on behalf of the plaintiff and the defendant respectively, as hereinafter denoted, is all the evidence that was introduced on the trial of this cause, the same being the testimony referred to in the foregoing decree:

J. T. WADDILL, called on behalf of the plaintiff, after being duly sworn, testified that he is the supervisor from Plymouth Magisterial District, in Lunenburg County, in which District said land in the bill described is situated; that he is chairman of the Plymouth District Maintenance Road Board; and that his board had never authorized Victor von Gemmingen, or any one else, to trespass on the said lands of the plaintiff as set out in the bill, and to remove his top-soil therefrom.

25 T. D. BRAGG, the plaintiff, after being duly sworn, testified that neither of the defendants, or the said V. von Gemmingen, or any one else had ever mentioned to him the subject of getting the said soil; that they were taking and removing it without his consent; that the first that he knew of it was when he went on the premises on the morning of the 12th of October and found the employees of the defendants removing said soil; that he requested them to cease removing the same, and they refused so to do until served with the *perliminary* injunction awarded in this case; that the said land is very fertile; that the particular spot from which the defendants are removing the soil is a spot set apart by the plaintiff as a residence site, upon which he contemplates building a handsome residence; that it is close to the public highway, leading from Victoria to Lunenburg Court House, and close to the corporate limits of the town of Victoria; that comprised in this residence site is about five or six acres of very valuable soil; that he had been using the same for growing tobacco for the past three years.

R. S. WEAVER, called on behalf of himself, testified as follows: that he is one of the partners of the firm known as Weaver and Flippin against whom the injunction was taken out; that the Permanent Road Improvement Board of Plymouth Magisterial District,
26 of which E. L. Kendig is chairman and E. L. Gee is secretary, advertised the said road to be reconstructed and rebuilt under the supervision of the State Highway Commission; that the same was let to the Emporia Concrete Company, they being the lowest bidders, and that he sublet this road or bought this contract from the said Emporia Concrete Company; that under their contract the said Permanent Road Improvement Board of which E. L. Kendig is chairman and E. L. Gee is secretary, was to furnish all soil and materials and was to designate the place where they were to take the soil and materials and say what soil was suitable and that the same was subject to the supervision of the State Highway Commission, whose representative in Lunenburg County is Mr. Victor von Gemmingen; that the said Mr. Victor von Gemmingen designated this soil to be taken from the said tract of T. D. Bragg as suitable soil, and designated a spot on the premises of the said T. D. Bragg, from which to take said soil for the said road, and that they so proceeded to take the same; that the said road is a public highway, which was built by the State Aid Funds some years ago and is now being resoiled and rebuilt with money derived from a sale of bonds for the Permanent Improvement of Roads, in said Magisterial District of Plymouth, in Lunen-

burg County, Virginia; that the Permanent Road Improvement Board of which E. L. Kendig is chairman, was appointed under a
27 special road law of Lunenburg County Virginia, approved on the 12th day of March, 1912, Acts 1912, page 308; that the said Lunenburg Special Road Law was amended by an act of the General Assembly passed March 21st 1914, Acts 1914 page 280, but that the said Act did not amend or in any way change the Act of 1912 of the said Law of Lunenburg County, under which this board, of which E. L. Kendig is chairman, was appointed; that by an Act of the General Assembly, the same being an emergency act approved March 17th, 1916, Acts 1916 page 497, this said board which is sometimes known as Road Construction Board of Plymouth Magisterial District and sometimes as Permanent Road Improvement Board of Plymouth Magisterial District, of which said Board E. L. Kendig is chairman, was authorized and empowered to expend the surplus money then in their hands, derived from the sale of bonds for the Permanent Road Improvement Board in the said Magisterial District of Plymouth, all of the roads named in order of the court ordering said election having been improved, to expend this said balance upon the resoiling and rebuilding other roads in the said district, including the said road from Victoria toward Lunenburg Court House, upon which the respondents were working, and for which work the said soil was taken from the said premises of the said T. D. Bragg; that the Board of Supervisors, of which said board your respondent was
28 a member, until the year 1913, passed a resolution, under which the road foreman employed by the said board of Plymouth Magisterial District of which E. L. Kendig is chairman, should have the power and authority of superintendents of roads employed by themselves (which said order or certified copy thereof is filed along with the record in this case); that the respondents R. S. Weaver and H. Flippin in taking and removing the soil from the said premises of the said T. D. Bragg, were acting under the authority and taking the said soil from the tracts and part of tracts designated by the said Victor von Gemmingen, who is the authorized agent of the State Highway Commission and also of the said road board, of which E. L. Kendig is chairman, to appoint, designate and select the soil and materials to be taken by the said contractors for the building, reconstruction, repairing and improvement of the said highway leading from Victoria towards Lunenburg Court House, upon which the said R. S. Weaver and H. Flippin were placing the said soil taken from the said premises of the said T. D. Bragg.

Mr. Victor von Gemmingen, another witness called on behalf of the defendants, testified as follows: that he is the engineer and representative of the State Highway Commission, who has charge of the work of building and improving roads in the County of Lunenburg, Virginia; that as such engineer under the authority of the
29 State Highway Commission it is his duty to select and designate the soil and materials to go on the said roads; that he was authorized and empowered and appointed by the Road Board of Plymouth Magisterial District, of which E. L. Kendig is chairman, to

select and designate the soil and other materials on the tracts from which the same should be taken for the building and improvement of the said road in the said district, one of which said roads was the road leading from Victoria to Lunenburg Court House, and upon which the said R. S. Weaver and H. Flippin were working at the time of the taking out of the injunction; that he selected and designated the soil which they were taking from the premises of the said T. D. Bragg, pointed out to them the place from which to take the said soil and told them what soil to get, and that they were acting under his authority and orders in taking and removing the soil from the premises of the said T. D. Bragg at the time the injunction was granted, and that the said soil was being used for the construction, reconstruction, and improvement and repairing of the said public highway which was being built under the control of the said road board of Plymouth Magisterial District, of which E. L. Kendig is chairman and which was being paid for out of the surplus money from the bond issues of the said Magisterial District of Plymouth, as provided for in the Acts of 1916, Acts 1916 page 197; that this was the
30 most suitable soil in this locality for the building of the said road and the most convenient, and the soil that may be taken with the least expense for the building, construction, reconstruction and repairing of the said road.

*Resolution of the Board of Supervisors of Lunenburg County Referred to in Foregoing Testimony.*

At an adjourned meeting of the board of Supervisors held in and for the county of Lunenburg, at the Court House thereof, on Monday the 29th day of September, 1913.

Be it resolved by the Board of Supervisors of Lunenburg County, invest the appointments of superintendents of roads while under construction, in Plymouth District, by the Plymouth District Road Board all of the powers of county of superintendents, in so far as it may be necessary, in constructing roads in said district, with the understanding that all the expenses are to be born by the said Plymouth District Road Board.

Teste: By consent, this 8th day of December, 1916.

WILLIAM R. BARKSDALE,
*Judge Circuit Court of Lunenburg County.*

31 I hereby agree that this is the evidence taken in this case, and for you to certify that this is the evidence.

Given under my hand this 7th day of December, 1916.

N. S. TURNBULL, JR.,
*Attorney for Defendants.*
GEO. E. ALLEN,
*Attorney for Complainant.*

32 STATE OF VIRGINIA,
*County of Lunenburg, To wit:*

I, John L. Yates, clerk of the circuit court for the county of Lunenburg, in the State of Virginia, do hereby certify that the foregoing is a true transcript of the record in the above styled case, and that due notice was given to the attorney for the said defendants, R. S. Weaver and H. Flippin, by the attorney for the plaintiff, that application would be made for a transcript of the record in said cause for the purpose of presenting the same to the Supreme Court of Appeals, along with a petition for an appeal and supersedeas to said decree.

Given under my hand this 15 day of December, 1916.

JOHN L. YATES, *Clerk.*

Clerk's fee charged to Plaintiff $7.50.

A copy.
Teste:—

H. STEWART JONES, *C. C.*

33 *Authentication of the Record.*

SUPREME COURT OF APPEALS,
*State of Virginia, ss:*

I, H. Stewart Jones, Clerk of said Court, do hereby certify that the foregoing pages numbered from 1 to 32, inclusive, are a true, full and complete transcript of the record and proceedings, in the case of T. D. Bragg, Appellant against R. S. Weaver and H. Flippin, Appellees, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Richmond, Virginia, this 25th day of January, 1917.

H. STEWART JONES,
*Clerk Supreme Court of Appeals of Virginia, at Richmond.*

I, George M. Harrison, one of the Judges and the President of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the foregoing is the true and genuine signature of H. Stewart Jones, Clerk of the said Court, and that the foregoing attestation made by him is in due form.

Witness my hand and seal this the 25 day of January, 1917.

GEORGE M. HARRISON,
*President Supreme Court of Appeals of Virginia.*

I, H. Stewart Jones, Clerk of said Court, do hereby certify that the Honorable George M. Harrison, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, President of the Supreme Court of Appeals of the State of Virginia, duly commissioned and qualified.

Witness my hand and the seal of the said Court, this the 25 day of January, 1917.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
*Clerk Supreme Court of Appeals of Virginia, at Richmond.*

34 In the Supreme Court of Appeals of the State of Virginia.

TALBOT DARBY BRAGG, Plaintiff,

v.

R. S. WEAVER and H. FLIPPIN, Defendants.

*Assignments of Error.*

Now comes the complainant in the above entitled cause and files the following assignments of error upon which we will rely upon his prosecution of his writ of error in the above entitled cause, from the decree of order made by the said Supreme Court of Appeals of the State of Virginia, on the third day of January, 1917.

First.

That the said court erred in holding that the defendants, under the statute law of Virginia, had a right to take the property of the complainant as set forth in these proceedings for use in the construction and repair of the public roads, without any notice to complainant, and opportunity to be heard on the necessity or the justice of the taking, because the taking under such circumstances is in violation of the fourteenth amendment of the constitution of the United States, declaring that no state shall deprive a person of property without due process of law.

Second.

That the said court erred in holding section 944*a* (clause 21) of the Code of the state of Virginia valid and not in conflict with the fourteenth amendment of the Constitution of the United States, as depriving complainant of his property without due process of law.

Third.

That the said Court erred in not declaring said section 944*a* (clause 21) of the Code of Virginia void, as contravening the Fourteenth Amendment of the Constitution of the United States, declaring that no state shall deprive any person of property without due process of law.

Fourth.

That the said court erred in not perpetually enjoining the defendants from taking the property of complainant as aforesaid for use in construction of public highways of the said county, because of the conflict of the said statute with the constitution of the United States.

35

Fifth.

That the said court erred in dismissing the bill of complainant without granting any relief therein *in* prayed for, because of the conflict of the said statute with the Constitution of the United States.

Wherefore for this and other manifest errors appearing in the record, said complainant, Talbot Darby Bragg, prays that the judgment and decission of the said Supreme Court of Appeals of the State of Virginia and the judgment and order of the Circuit Court of Lunenburg County, Virginia, be reversed and set aside and held for naught, and that judgment be entered for complainant, Talbot Darby Bragg, granting him his rights under the Constitution of the United States, and the said Talbot Darby Bragg also prays judgment for his costs.

GEO. E. ALLEN,
H. C. GREGORY,
*Counsel for Complainant.*

Supreme Court of Appeals of the State of Virginia.

TALBOT DARBY BRAGG, Complainant,

v.

R. S. WEAVER and H. FLIPPIN, Defendants.

*Petition for a Writ of Error.*

Considering himself aggrieved by the final decision and judgment of the Supreme Court of Appeals of the State of Virginia in refusing a writ of error to the final judgment and order of the Circuit Court of Lunenburg County in the above entitled proceedings, and also considering himself aggrieved by the final order and judgment of the Circuit Court of Lunenburg County in the said proceedings, Talbot Darby Bragg hereby prays a writ of error from the said decision and judgment of the Supreme Court of Appeals of Virginia, and from the said judgment and order of the circuit court of Lunenburg County, to the Supreme Court of the United States. Assignments of error are filed herewith.

GEO. E. ALLEN,
H. C. GREGORY,
*Counsel for Complainant.*

36 STATE OF VIRGINIA,
*Supreme Court of Appeals.*

Let the writ of error issue upon the execution of a bond by Talbot Darby Bragg, to R. S. Weaver and H. Flippin in the sum of $1,000.00, said bond, when approved, to act as a supersedeas to the decision and judgment of the Supreme Court of Appeals aforesaid, and to the judgment and order of the Circuit Court of Lunenburg County aforesaid.

ated this 22nd day of January, 1917.

GEORGE M. HARRISON,
*President of the Supreme Court of Appeals of the State of Virginia.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Supreme Court of Appeals of Virginia:

Because in the record and proceedings, as also in the rendition of the judgment in the proceedings, which is in the said Supreme Court of Appeals of Virginia, before you, on application for a writ of error to the judgment and order of the Circuit Court of the County of Lunenburg, Virginia, at the Jan'y term, 1917, thereof, in certain proceedings wherein Talbot Darby Bragg was complainant, and R. S. Weaver and H. Flippin were defendants, a manifest error has happened, to the great damage of the said Talbot Darby Bragg, to which judgment and order the Supreme Court of Appeals of Virginia subsequently, to-wit, on the third day of January, 1917, refused a writ of error, thereby affirming said judgment of said Circuit Court of Lunenburg County, Virginia.

We being willing that error, if any has been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, that when under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the City of Washington, D. C., and filed in the office of the Clerk of the United States Supreme Court on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid be inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right,
37 and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 25th day of January, 1917.

Done in the city of Richmond, with the seal of the District Court of the United States for the Eastern District of Virginia, attached.

[Seal United States District Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
*Clerk of the United States District Court for the Eastern District of Virginia.*
By R. E. POWERS,
*Dep'y Clerk U. S. District Court for the Eastern District of Virginia.*

Allowed.
GEORGE M. HARRISON,
*President of the Supreme Court of Appeals of Virginia.*

The original of the foregoing writ of error was lodged with the Clerk of the Supreme Court of Appeals of Virginia on the 25th day of January 1917.

H. STEWART JONES,
*Clerk Supreme Court of Appeals of Virginia.*

Copy.

*Bond.*

Know all men by these presents*m* that we, Talbot Darby Bragg, as principal, and United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto R. S. Weaver and H. Flippin in the sum of $1,000 to be paid to R. S. Weaver and H. Flippin, to which payment, we- and truly to be made, we bind ourselves jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of January, 1917.

Whereas the above named Talbot Darby Bragg seeks to prosecute his writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled proceedings by the Circuit Court of Lunenburg County, Virginia, which judgment was affirmed by the refusal of the Supreme Court of Appeals of the State of Virginia to grant a writ of error thereto or an appeal therefrom.

Now, therefore, the condition of this obligation is such that if the above named Talbot Darby Bragg shall prosecute his said writ of error to affect and answer all costs and damages that may at-
38 tach, if he shall fail to make good his plea, then this obligation is to be void: otherwise to remain in full force and virtue.

TALBOT DARBY BRAGG. [SEAL.]
U. S. FIDELITY & GUARANTY CO.,
By JOHN L. YATES, [SEAL.]
*Its Att'y & Att'y in Fact.*

I, John L. Yates, Clerk of the circuit court of Lunenburg County, do hereby certify that the above bond was duly executed in my office by the said Bragg, as principal, and by the United States Fidelity and Guaranty Co., as surety, by me, its duly authorized agent and attorney in fact.

JOHN L. YATES,
*Clerk Circuit Court Lunenburg County.*

This bond is approved.

GEORGE M. HARRISON,
*President of the Supreme Court of Appeals of the State of Virginia.*

The original of the foregoing bond was lodged with the clerk of the Supreme Court of Appeals of Virginia on the 22 day of January, 1917, and the following endorsement was made thereon:

Bond. Filed January 22, 1917. H. Stuart Jones, Clerk Supreme Court of Appeals of Virginia.

[Endorsed:] Received & filed Jan. 25, 1917. H. Stewart Jones, C. C. By R. C. Tyler, D. C.

39 UNITED STATES OF AMERICA, *ss:*

The President of the United States to R. S. Weaver and H. Flippin, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirt*h* days from the date hereof, pursuant to writ of error filed in the office of the Clerk of the Supreme Court of Appeals of Virginia, wherein Talbot Darby Bragg is plaintiff in error, and you defendants in error, to show cause if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the party in that behalf.

Witness the President of the Supreme Court of Appeals of the State of Virginia, this 25th day of January, 1917.

GEORGE M. HARRISON,
*President of the Supreme Court of Appeals of the State of Virginia.*

Attest:

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
*Clerk of the Supreme Court of Appeals of the State of Virginia.*

VICTORIA, VIRGINIA, January 25th, 1917.

I, N. S. Turnbull, Jr., attorney for the defendants in error, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

N. S. TURNBULL, JR.,
*Counsel for the Defendants in Error.*

40 UNITED STATES OF AMERICA,
*Supreme Court of Appeals of Virginia, ss:*

In obedience to the commands of the within writ, I hereby transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I Hereunto subscribe my name, and affix the seal of the said Supreme Court of Appeals of Virginia, in the city of Richmond, this 25th day of January, 1917.

H. STEWART JONES,
*Clerk Supreme Court of Appeals of Virginia.*

Plaintiff's costs, $18.50 paid by T. D. Bragg.
Defendant's costs $— paid by —— ——.
Costs of transcript $7.50, paid by T. D. Bragg.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
*Clerk Supreme Court of Appeals of Virginia.*

40½ [Endorsed:] T. D. Bragg v. R. S. Weaver and H. Flippin. Petition for Writ of Error. Geo. E. Allen, Lawyer, Victoria, Virginia.

Endorsed on cover: File No. 25,765. Virginia Supreme Court of Appeals. Term No. 935. Talbot Darby Bragg, plaintiff in error, vs. R. S. Weaver and H. Flippin. Filed February 12th, 1917. File No. 25,765.

FILED
SEP 10 1918
JAMES D. MAHER,
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

NO. 13122

TALBOT DARBY BRAGG, PLAINTIFF IN ERROR,

v.

R. S. WEAVER AND H. FLIPPIN.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

## BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

APPEALS PRESS, RICHMOND, VA.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

---

NO. 935.

---

TALBOT DARBY BRAGG, PLAINTIFF IN ERROR,

v.

R. S. WEAVER AND H. FLIPPIN.

---

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

---

## BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

---

### STATEMENT OF THE CASE.

The questions involved in this case arise upon a bill for an injunction filed in the Circuit Court of Lunenburg coun-

ty on the 12th day of October, 1916. In this bill it is alleged that the plaintiff in error is the owner of a very valuable tract of land comprising about eighty (80) acres, situated just outside of the corporate limits of the town of Victoria, on the public road leading from Victoria to Lunenburg Court House. A parcel of about four (4) or five (5) acres of this land had been selected and set apart by the plaintiff in error as an ideal residence site upon which he contemplated erecting a handsome residence. The soil on the entire tract of eighty (80 )acres and particularly that part set apart for a residence site, is alleged to be very fertile. At the time of the filing of the bill, the defendants in error, without the knowledge or consent of the plaintiff in error, had just entered upon this tract of land and especially that part set aside as a residence site, and with a large force of employees, wagons, teams, etc., begun to dig up and remove the top-soil therefrom and was using the same in the construction and repair of a public highway.

A temporary injunction was awarded in accordance with the prayer of the bill, which the defendants in error promptly moved to dissolve, alleging as good cause for such dissolution, that they were independent contractors engaged in resoiling the public road leading from Victoria to Lunenburg Court House; and that the soil which they were removing from the lands of the plaintiff in error was being removed pursuant to the statute law of Virginia, authorizing the road authorities to take from the most convenient lands so much wood, stone, gravel or earth as may be necessary to be used in constructing or repairing and road.

The injunction was dissolved by the Circuit Court and its decree was affirmed by the Supreme Court of Appeals of Virginia. To the final judgment of the latter court a writ of error was sued out and the case was brought before this court.

## ASSIGNMENTS OF ERROR.

The errors assigned are as follows:

1. That the said court erred in holding that the defendants, under the statute law of Virginia, had a right to take the property of the complainant as set forth in these proceedings for use in the construction and repair of the public roads, without any notice to complainant, and opportunity to be heard on the necessity or the justice of the taking, because the taking under such circumstances is in violation of the fourteenth amendment of the constitution of the United States, declaring that no State shall deprive a person of property without due process of law.

2. That the said court erred in holding section 944a (clause 21) of the Code of the State of Virginia valid and not in conflict with the fourteenth amendment of the Constitution of the United States, as depriving complainant of his property without due process of law.

3. That the said court erred in not declaring said section 944a (clause 21) of the Code of Virginia void, as contravening the Fourteenth Amendment of the Constitution of the United States, declaring that no State shall deprive any person of property without due process of law.

4. That the said court erred in not perpetually enjoining the defendants from taking the property of complainant as aforesaid for use in construction of public highways of the said county, because of the conflict of the said statute with the constitution of the United States.

5. That the said court erred in dismissing the bill of complainant without granting any relief therein prayed for, because of the conflict of the statute with the Constitution of the United States.

## ARGUMENT.

The plaintiff in error's assignments of error, reduced to their lowest terms, amount to an exception to the ruling of the court that under the statute law of Virginia, the defendants in error had a right to take the property of the plaintiff in error, as set forth in these proceedings, for use in construction and repair of the public roads in question, without any notice to complainant and without any opportunity to be heard on the necessity or justice of the taking, upon the ground that such a taking is in violation of the 14th Amendment of the Constitution of the United States, which declared that no State shall deprive any person of property without due process of law.

The statute relied upon by the defendants in error as authority for the taking of the property of the plaintiff in error in the manner described in these proceedings is section 944a of Pollard's Code (1904), clauses 21 and 22, and reads as follows:

> (21). The superintendent of roads shall cause the roads of his county to be kept cleared, smoothed of rocks and obstructions, of necessary width, well drained, and otherwise in good order, and secure from the falling of dead timber thereon. He shall cause to be placed and kept across every stream where it is necessary and practicable a sufficient bridge, bench, or log for the accommodation of foot passengers. He may take from the most convenient

lands so much wood, stone, gravel or earth as may be necessary to be used in constructing or repairing any road, bridge or causeway therein; he shall take such earth from the most convenient and the nearest place so as to save the expense of hauling such earth any distance, and, for the purpose of draining the road, may cause a ditch to be cut through the lands adjoining the same; provided, such wood and other materials be not taken from, and such ditch be not cut through any yard, or garden without the consent of the owner, and provided said superintendent shall not cut, deface, or destroy any fruit trees nor any ornamental trees planted or left for ornament or shade nor any hedge planted or left as a protection to cattle; provided further, that the same does not in any wise interfere with travel along said road."

(22). If the owner or tenant of any such land shall think himself injured thereby, and the superintendent of roads, or his deputy, can agree with such owner as to the amount of damage, they shall report the same to the board of supervisors or, if they cannot agree, a justice, upon application to him, shall issue a warrant to three freeholders, requiring them to view the said land, and ascertain what is a just compensation to such owner or tenant for the damage to him by reason of anything done under the preceding section. The said freeholders, after being sworn according to the provisions of section three of this act, shall accordingly ascertain such compensation and report the same to the board of supervisors. Said board may allow the full amount so agreed upon, or reported by said freeholders, or so much thereof as upon investigation they may

> deem reasonable, subject to such owner or tenant's right of appeal to the circuit court as in other cases."

While this statute does not attempt to authorize any one but the county superintendent of roads to exercise the authority, attempted to be delegated, subsequent acts of the General Assembly of Virginia, it is claimed, invested similar authority in the Local Board which actually undertook to exercise the power in this case. See Acts of General Assemply of Virginia, 1912, page 308, Acts of Assembly, 1914, page 280, and the Acts of 1916, page 497. It is submitted that these acts and particularily section 944a Pollard's Code, (1904), clauses 21 and 22, are violative of the Fourteenth Amendment of the Constitution of the United States, because they authorize the taking by public officials of private property for public use, without due process of law.

In the case of *Home Telephone & T. Company* v. *City of Los Angeles et als.*, 33 Sup. Ct. 312, this court said:

> "1. The prohibitions and guaranties of U. S. Const., 14th Amend., are addressed to, and control, not only the States, but also every person, whether natural or juridical, who is the repository of State power."
>
> "2. A case where one in possession of State power uses that power to the doing of wrongs which are forbidden by U. S. Const., 14th Amend., is within the purview of that Amendment, even though the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the State authority lodged in the wrongdoer."

It is submitted that the prohibitions and guaranties of the 14th Amendment controlled the persons in this case in whom State power was reposed, and that such persons had no right, in view of this Amendment, to take the property of the plaintiff in error, by virtue of the statute referred to, because such statute makes no provision for an opportunity to be heard in behalf of the plaintiff in error before the property is taken on the question of the justice or necessity of the taking, or the compensation to be awarded. There is nothing in the statute which, even after the proerty is taken, prevents the local authorities from applying to a justice of the peace and having the damages assessed and awarded on an *ex parte* hearing, and, as a matter of fact, that is what is sometimes done in cases of this kind. The procedure for recovering compensation, provided for by clause 22 of the statute, is not available until the property has been taken, in such quantities, in such manner, in such places, and at such time as the persons in authority desire to take it. There is not the slightest opportunity afforded to contest the justice, necessity or correctness of the taking, nor any means provided to ascertain, in the interest of the owner, the quantity taken. Not only this, after the property is thus taken, the statute authorizes those taking it to apply to a justice for the appointment of commissioners to assess the damages, without making any provision for notice to the owner upon the appointment of such commissioners, and without making any provision for notice to the owner upon the return of this warrant upon which the damages are assessed, and without making any provision for notice to the owner upon the proceedings when this warrant is before the Board of Supervisors, should it be taken there. The statute not only authorizes the taking of the property by the State for public uses, without notice and opportunity to be heard on behalf of the owner, but also

authorizes *ex parte* proceedings for the assessment of the damages thereafter, without any notice or opportunity to be heard on the part of the landowner.

While these may be termed the extreme possibilities of the statute, this court has said that they may be resorted to in order to test a law. *Eubank* v. *City of Richmond*, 33 Sup. Ct. 36. Such possibilities are certainly attainable by virtue of this statute. As an illustration, plaintiff in error begs to be permitted to refer to an instance where property was taken under this statute by local road authorities, application made to a justice, commissioners appointed, and the damages awarded without the knowledge of the landowner. He had no notice of the taking until the property was taken, and the first he heard of the proceedings for the assessment of the damages was when he received a check for the amount of the damages that had been awarded him. Of course, it is true that the landowner also has the right AFTER the property is taken to apply for the appointment of these commissioners to assess the damages, but, if for any reason, he does not do so promptly, the road authorities may do so without notice to him as above shown.

As to notice and opportunity to be heard before property is taken by the State for public use, see the case of *Soliah et als.* v. *Heskin et als.*, 32 Sup. Ct. 103, where this court said:

> "A State statute authorizing an appointed drainage board to determine whether a proposed drain will be a public benefit, and to create a drainage district consisting of land which it decides will be benefited by such drain, and to make special assessments accordingly, is not invalidated by the due-process-of-law clause of the 14th Amendment to the Federal

> Constitution, if notice is given, and an opportunity to be heard is afforded the landowner before the assessment becomes a lien against his property."

Surely, if one is entitled to notice and opportunity to be heard before a lien is placed on his property, *a fortiori*, he is entitled to such notice and opportunity before his property is absolutely taken in fee simple.

In the case of *Eubank* v. *City of Richmond*, 33 Sup. Ct. Rep. 76, *supra*, this court held that:

> "An unconstitutional infringement of the guaranties of U. S. Const., 14th Amend., which cannot be upheld as an exercise of the police power, results from a municipal ordinance passed under the authority of Va. Laws, 1908, p. 623, which requires the committee on streets, upon request of the owners of two-thirds of the abutting property, to establish a building line on the side of the square on which such property abuts, not less than 5 nor more than 30 feet from the street line."

In the Eubank case, *supra*, a few feet of Eubank's lot fronting on the street was taken from him by virtue of the establishment of the building line further back than its location theretofore. This line was established by a street committee acting under the authority of a statute and without notice and opportunity to be heard on behalf of the landowner. This court declared the law under which the committee acted in violation of the 14th Amendment. It is submitted that on the same principle section 944a, clause 21, should be declared void.

In the case of *Embree et al.* v. *Kansas City and etc., Road District et al.*, 36 Sup. Ct. 317, where in the creation of a road district for the purpose of improving a public highway, the costs were to be borne temporarily by the issue and sale of bonds and ultimately by the levying and collection of special taxes upon all the lands in the district, this court held that in order to satisfy the due-process-of-law, clause of the United States Constitution, 14th Amendment, it was essential that the landowners be accorded the opportunity of a hearing before the creation of the district upon the question whether their lands would be benefited by its creation. When the suit was begun the road district had been organized, a road had been selected for improvement, and preliminary steps had been taken for the issuing of the bonds and the levying of the special taxes conformably to a local statute. The plaintiff owned land within the district and objected to the issuing of the bonds and the levying of the special taxes upon the ground that the scheme for subjecting the land to the cost is repugnant to the due process clause of the 14th Amendment of the Constitution of the United States, in that the landlord was not afforded any opportunity to be heard on the questions whether his land would be benefited by the improvement. The court said, page 319, that:

> "As the district was not established by the legislature, but by an exercise of delegated authority, there was no legislative decision that its location, boundaries, and needs were such that the lands therein would be benefited by its creation and what it was intended to accomplish, and, this being so, it was essential to due process of law that the landowners be accorded an opportunity to be heard upon the question whether their lands would be thus bene-

fited. If the statute provided for such a hearing, the decision of the designated tribunal would be sufficient, unless made fraudulently or in bad faith. *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. 112, 167, 174, 175, 41 L. Ed. 369, 391, 394, 17 Sup. Ct. Rep. 56.

"Did the statute contemplate such a hearing? We have seen that it required that adequate public notice be given of the presentation of the petition for the creation of the district and the time when it would be considered, made provision for the presentation of remonstrances by owners of lands within the proposed district, and directed that the petition and remonstrances be heard by the county court, that the court make such change in the boundaries 'as the public good may require' and that the boundaries be not enlarged unless the owners of the lands not before included consent in writing or appear at the hearing and be given an opportunity to present objections. That a hearing of some kind was contemplated is obvious, and is conceded. But it is insisted that it was not to be directed to the question whether the lands included would be benefited by the creation of the district and what it was intended to accomplish. If that were so, there would be little purpose in the hearing and no real necessity for it."

In the case of *St. Louis and Kansas City Land Company et al.* v. *Kansas City*, 36 Sup. Ct. 647, this court, in discussing the right of prior notice to the owner of property which may be assessed for benefits in order to pay an award for property condemned, held that:

> "The established rule is that it is only those whose property is proposed to be taken for a public improvement that due process of law requires shall have prior notice."

In the cases of *Garfield* v. *United States* at the relation of *Goldsby and Allison*, 29 Sup. Ct. 63, and 67, decided Nov. 30th, 1908, this court said:

> "In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.
>
> "The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is of the essence of the due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court."

In the case of *Hagar* v. *Reclamation District No.* 108, 111 U. S. 701, a California statute provided for the creation of Boards of Supervisors of reclamation districts out of overflowed lands. After the necessary reclamation expenses had been estimated commissioners appointed by the Supervisors were to assess upon each acre reclaimed or benefited an amount proportionate to the whole expense and to the benefits of the reclamation. Hagar's land was included in such a district and he refused to pay the assessment. Suits were brought to enforce against him the liens

on his land for the assessments. It was contended by Hagar that the law under which the assessment was made and levied was contrary to the 14th Amendment of the constitution of the United States, which declares that no State shall deprive any person of property without due process of law. The court held that while notice and opportunity to be heard on the questions arising on the assessment were essential to the creation of a valid lien on Hagar's land, such notice was provided by a law which made the lien enforceable only by means of legal proceedings in which any defense going either to the validity or the amount could be pleaded, and that, therefore, the law under which the assessments were made was not in conflict with the 14th Amendment.

In the case at bar the right to take absolutely, in fee simple, the property of the plaintiff in error, without the semblance of any proceedings in court, providing for notice and hearing, was, by the lower court, declared to exist by virtue of the statute referred to. The only remedy left to the plaintiff in error was his action for damages for property of which he had been deprived without the semblance of any judicial proceedings whatsoever.

He never at any time had any opportunity to contest the necessity, right, justice or accuracy of the taking of his property for public use.

It is needless to cite additional authorities on a proposition which would seem to be plain and simple. It is submitted that the assignments of error are well taken; that section 944a (clause 21) Pollard's Code of Virginia (1904) is in conflict with the due process clause of the Federal Constitution and, therefore, void; that the decision of the lower

court should be reversed and the case remanded for further proceedings appropriate to the facts, and not in conflict with the fundamental law of the land.

Respectfully submitted,

GEO. E. ALLEN,
Attorney for Plaintiff in Error.

August 28th, 1918.

John Garland Pollard,
of counsel

Office Supreme Court, U. S.
FILED
OCT 13 1919
JAMES D. MAHER,
CLERK.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

No. [redacted]22

TALBOT DARBY BRAGG, PLAINTIFF IN ERROR

V.

R. S. WEAVER AND H. FLIPPIN.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

APPEALS PRESS, RICHMOND, VA.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

No. 131.

TALBOT DARBY BRAGG, PLAINTIFF IN ERROR

V.

R. S. WEAVER AND H. FLIPPIN.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

## REPLY BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

The questions presented in this case are not, as stated by counsel for the defendants in error, on page two of their brief,

> "Whether or not the State of Virginia, through its agents, can take private property for public use, where just compensation is provided for, and whether or not such compensation must be paid in advance of the taking."

There can be no question of the right of the State of Virginia in the exercise of its sovereign power of eminent domain to take private property for public use. Such a right undoubtedly appertains to every independent government and is not here drawn in question.

Counsel for defendants are likewise in error when they say, page five of their brief, that this case is

> "Narrowed down to the single question as to whether or not compensation must be made for private property taken for public use *before the actual taking of the same.*"

The real question here involved is *whether the State of Virginia can take private property for public use without notice to the owner of the proceedings by virtue of which the same is taken.* In other words, does a proceeding by virtue of which private property is taken by the State for public purposes conform to the requirements of the due-process-of-law clause of the Federal Constitution, when such proceeding fails to provide any notice thereof to the owner? When that question is answered satisfactorily, this case will be disposed of. Only one of the many authorities relied upon by counsel for the defendants in error advert to this question, namely, the case of *Mary I. Lancaster, Trustee,* v. *Augusta Water District,* 108 Me. 137, and that case supports the contention of the plaintiff in error. While the court there held that the owners, being themselves part of the public whose interests are paramount, are not entitled to notice or a hearing upon the expediency or necessity of taking the property for public uses, the court further held that the owners were entitled to notice of the proceedings by virtue of which the property was taken and such notice must be given before the property

is taken. We quote from an extract taken from this case and embodied in the brief of counsel for the defendants in error, pp. 7 and 8, as follows:

> "The law which governs notice in eminent domain proceedings recognizes equally the right of public and of the owner, and the requirement of personal notice to the owner in every case of the taking would be inexpedient and unreasonable. The title might be uncertain, the owners absent, numerous or unknown, and their interest in the property different. It has, therefore, been decided that notice by publication or by posting is sufficient, even in respect to persons residing within the jurisdiction where the proceedings are pending. *Wilson* v. *Hathaway*, 42 Iowa 173; *McIntire* v. *Marine*, 93 Ind. 193; but the constitutional requirement will be satisfied by giving reasonable notice, the standard being that it must be such as to afford the persons interested an opportunity to be heard upon matters affecting their private rights. * * *
>
> "In all such cases it is enough if there is such a notice as makes it reasonably certain that all persons interested who easily can be reached will have information of the proceedings, that there is such a probability as reasonably can be provided for, that those at a distance also may be informed."

Counsel for the plaintiff in error is not aware of any decisions anywhere in this country which support the proposition that private lands may be taken by the State for public purposes in any proceedings which affords the owner thereof no opportunity to be heard with respect thereto.

A critical examination of the statute in question reveals that it provides not *only* for the taking of lands, or the soil therefrom, by the State, for public purposes, without notice to the owner with respect to the taking—it also provides for a proceeding for the securing of compensation which presents a grave question as to whether the constitutional requirements with respect to securing compensation are met. It will be observed that

> "A justice upon application to him, shall issue a warrant, etc."

The statute does not say upon whose application, whether of the land-owner or the board of supervisors, or other duly constituted authorities of the State. It is perfectly clear, as stated on page seven, of the brief, in behalf of the plaintiff in error, that the duly constituted road authorities may, under this statute, apply to a justice for the appointment of the free-holders for the assessment of the damages and a report of the same may be made to the board of supervisors without any notice to the land-owner of the application, or of the report, or of the action of the board upon the report. Under the statute law of Virginia, appeals from the decisions of the board of supervisors to the circuit court have to be taken in ten days from the date of such decisions. This period may elapse before the land-owner receives information of the proceeding. Illustrative of this phase of the matter, counsel for the plaintiff in error again refers to the fact that such proceedings have been had in the State of Virginia under this statute, of which the first notice the land-owner had was the receipt of a check for the compensation awarded by the board of supervisors in acting upon the report. If this be due process of law, as preserved by the Federal Con-

stitution, Fourteenth Amendment, then, truly, in the language of John Randolph Tucker, "May God save the Commonwealth."

Suppose the land-owner desires to show that the taking is not for public purposes, should he not have the right to do so? It sometimes happens that the taking is not for a public purpose, though claimed to be. Suppose the road upon which this soil was to be put was not in fact a public highway, should not the land-owner have the opportunity to be heard upon this question? Surely, this matter goes to the very issue of the question of due process of law. This court held in the late case of *Sears* v. *City of Akron*, 246 U. S. 242, 28 Sup. Ct. 245, that the question whether the purpose of the taking is for a public use is a judicial question.

Furthermore, clause 21, of the statute in question, prohibits the taking of such materials from any yard or garden. Suppose the land-owner contends that the particular spot from which such materials are to be taken is a part of his yard or garden, is this not a judicial question also?

There may be many grounds upon which the land-owner might be able to defeat the right to take such materials altogether, if he were only given an opportunity to be heard. Should he not be given this opportunity? If not, then his property *may* be taken illegally.

It is extremely doubtful whether the Legislature of Virginia ever contemplated that Section 944a, Clauses 21 and 22, should provide for anything more than temporary relief.

These provisions are embodied in the Code of 1887, as sections 985 and 986. At that time, the Legislature did not have in mind extensive plans for road building, such as would require the taking of acres and acres of top soil. It could not have intended for these sections to furnish

authority for the taking of private property for public uses on such an extensive scale as is required in modern road-building.

Furthermore, when the State came to make provisions for the exercise of the power of eminent domain, it recognized the necessity, under certain circumstances, of taking large quantities of sand, earth, gravel, etc., and provided for the taking of same by condemnation proceedings, under the provisions of an act concerning the exercise of the power of eminent domain, Acts 1902-1903-1904, page 957, Pollard's Code, section 1105f, clause 25. After making ample provision for condemnation proceedings, clause 25 of this act provides as follows:

> "If the court, or the board of supervisors of any county, the council of any city or town, the trustees of any school district, the institution for the deaf and blind, any of the State hospitals, the University of Virginia, the Virginia Military Institute, or any other institution of this State, cannot, because of the incapacity of the owner, or inability to agree upon a price or terms, or because the owner cannot, with reasonable diligence, be found in this State, or is unknown, agree on terms of purchase with those entitled to any land, buildings, structures, sand, earth, gravel, water, or other material necessary to be taken and used for the purposes of such county, city, or town, or school district, or for the purposes of the institution for the deaf and blind, or of any such State Hospital, or of the University of Virginia, or of the Virginia Military Institute, or of any other State institution, it may acquire the same by condemnation under the provision of this act, and the

proceedings in all such cases shall be according to the provisions of this act so far as they can be applied to the same."

It will be observed that reading clause 25 of this section of the Code, together with clauses 21 and 22 of section 944a, in the light of the fact that clause 25 of section 1105f was enacted in 1902-1903-1904, and clauses 21 and 22 of 944a were enacted in 1887, it cannot be contended, with any shadow of reason, that the clauses of 944a contemplated more than temporary relief. Any construction which would extend them beyond such contemplation would certainly be violative of the Federal Constitution. In further support of this view, the court's attention is directed to the fact that the revisors of the Code of 1919, which is just out, eliminated clauses 21 and 22 of section 944a from the revised Code and substituted in lieu thereof regular condemnation proceedings, providing for notice. The new Code does not take effect, however, until January, 1919.

It is submitted that the assignments of error are well taken; that section 944a (clauses 21 and 22), Pollard's Code of Virginia (1904), is in conflict with the due-process-clause of the Federal Constitution and, therefore, void; that the decision of the lower court should be reversed and the case remanded for further proceedings appropriate to the facts, and not in conflict with the fundamental law of the land.

Respectfully submitted.

GEO. E. ALLEN,
JNO. GARLAND POLLARD,
Attorneys for Plaintiff in Error.

October 3, 1919.

FILED
DEC 12 1918
JAMES D. MAHER,
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1918

No. [redacted]22

TALBOT DARBY BRAGG, Plaintiff-in-Error,

*v.*

R. S. WEAVER AND H. FLIPPIN.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF ON BEHALF OF THE DEFENDANTS.

JNO. R. SAUNDERS,
*Attorney General of Virginia.*

J. D. HANK, JR.,
*Assistant Attorney General of Virginia.*

F. B. RICHARDSON,
*Law Assistant.*

N. S. TURNBULL, JR.,
*Commonwealth's Attorney of Lunenburg Co.*

## SUBJECT INDEX.


| | *Page No.* |
|---|---|
| Acts of Assembly, 1914, page 280 | 4 |
| Argument | 2 |
| Assignments of error | 2 |
| Code of Virginia, Clause 21, Sec. 944-A | 3 |
| Code of Virginia, Clause 22, Sec. 944-A | 5 |
| Compensation need not be paid in advance | 9 |
| Conclusion | 20 |
| Constitutionality of Statutes presumed | 6 |
| Direct authority under which defendants acted | 4 |
| Eminent domain appertains to every independent government. | 3 |
| Method provided for obtaining compensation | 5 |
| No notice or hearing upon the expediency or necessity of the taking required | 7 |
| Private property may be taken by the State of Virginia for public uses | 2 |
| Review of cases relied on by counsel for the plaintiff-in-error | 17, 18, 19, 20 |
| Sec. 1, Art. 14, United States Constitution | 5 |
| Sec. 58, Constitution of Virginia | 5 |
| Statement of the case | 1 |
| Statute of Virginia under which property was taken | 3 |
| Statute of Virginia providing compensation | 6 |

## CASES REFERRED TO.


*Page No.*

Backus, Jr., & Sons *v.* Ft. Street Union Depot Co., 169 U. S. 557; 40 L. Ed. 859 ..... 13

Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641; 34 L. Ed. 303 ..... 10

City of Cincinnati *v.* Louisville & Nashville R. Co., 223 U. S. 390; 56 L. Ed. 481 ..... 3

Crozier, Wm. *v.* Freid-Krupp, etc., 224 U. S. 390; 56 L. Ed. 771 ..... 8

Embree *v.* Kansas City & Liberty Blv'd. Road Dist., 240 U. S. 242 ..... 19

Eubank *v.* City of Richmond, 226 U. S. 137..... 19

Garfield *v.* U. S. ex. rel. Goldsby & Allison, 211 U. S. 249.... 20

Hagar *v.* Reclamation District, No. 108, 111 U. S. 701..... 21

Home Telephone & Telegraph Co., *v.* City of Los Angeles, 211 U. S. 265; 53 L. Ed. 176 .....6, 17

Lancaster, Mary L., Trustee *v.* Augustus Water Dist., 108 Maine 137 ..... 7

Mississippi & Rum River Boom Co. *v.* Patterson, 98 U. S. 403; 25 L. Ed. 206 ..... 2

Mt. Vernon Woodberry Cotton Duck Co. *v.* Alabama Interstate Power Co., 240 U. S. 30 ..... 10

St. Louis & Kansas City Land Co. *v.* Kansas City 241, U. S. 419 ..... 19

Shoemaker *v.* United States, 147 U. S. 282; 37 L. Ed. 184.... 15

Soliah *v.* Eskins, 222 U. S. 522..... 18

Sweet *v.* Rechel, 159 U. S. 380; 40 L. Ed. 197..... 11

Tait's Ex'or. *v.* Central Lunatic Asylum, 84 Va. 271..... 15

Williams *v.* Parker, 188 U. S. 491; 47 L. Ed. 560..... 9

Zircle *v.* Southern Railway Co., 102 Va. 22..... 15

# In the Supreme Court of the United States

## OCTOBER TERM, 1918

## No. 131

TALBOT DARBY BRAGG, Plaintiff-in-Error,

*v.*

R. S. WEAVER AND H. FLIPPIN.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF ON BEHALF OF THE DEFENDANTS.

## STATEMENT OF THE CASE.

The defendants, who are independent contractors working under the authority of the Permanent Road and Improvement Board of Plymouth Magisterial District of Lunenburg County, Virginia, were engaged in October, 1916, in resoiling the public road in said Plymouth Magisterial District, leading from Victoria to Lunenburg Courthouse, and, as such contractors, acting under the authority of said Road Board, were directed and authorized to take from the lands of the plaintiff-in-error such top soil, earth, etc., as was needed for the purposes of resoiling the said road, by one Victor von Gemmigen, who had been authorized and empowered, as the agent of the said Road Board, to select such soil and material as he might deem best for the repairing of the said road. The plaintiff-in-error was awarded an injunction by the Circuit Court of Lunenburg County, which, upon a hearing, was dissolved and the bill dismissed. The plaintiff-in-error filed his petition for an appeal in the Supreme Court of Appeals of Virginia, and an appeal was denied. To the final judgment of the latter court a writ of error was sued out, and the case brought before this court.

## ASSIGNMENTS OF ERROR.

Counsel for the plaintiff-in-error, on p. 3 of his brief, assigns five grounds of error which were relied on in the Supreme Court of Appeals of Virginia in his petition for a writ of error in that court, all of which have been treated under one general head by counsel for the plaintiff-in-error, and will here be answered in the same manner.

## ARGUMENT.

The questions presented in the case at bar are whether or not the State of Virginia, through its agents, can take private property for public use, where just compensation is provided for, and whether or not such compensation must be paid in advance of the taking.

### THE STATE OF VIRGINIA IN THE EXERCISE OF ITS SOVEREIGN POWER OF EMINENT DOMAIN, MAY TAKE PRIVATE PROPERTY FOR PUBLIC USE.

No contention is made by counsel for plaintiff-in-error that the State of Virginia can not take private property for public use where provision for just compensation is made. In the exercise of its sovereign power of eminent domain there can be no question that private property may be taken by the State of Virginia for public use, such taking being limited only to public use, and that some provision must be made whereby the owner of such private property is provided a reasonable, convenient and adequate remedy whereby he may obtain just compensation for such property.

In *Mississippi & Rum River Boom Co.* v. *Wm. C. Patterson, Jr.*, 98 U. S. 403; 25 L. Ed. 206, Mr. Justice Field, in delivering the opinion of the court, says:

> * * * * The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the Constitutions of the several States providing for just compensation for property taken is a mere limitation upon the exercise of the right. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an Act of the Legislature, or the power of ap-

propriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry take the form of a proceeding before the courts between parties, the owners of the land on the one side, and the Company seeking the appropriation on the other, there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the State."

In the case of *City of Cincinnati* v. *Louisville & Nashville Railroad Co.*, 223 U. S. 390; 56 L. Ed. 481, Mr. Justice Lurton, in delivering the opinion of the court, says:

"This right of appropriating private property to a public use is one of the powers vital to the public welfare of every self-governing community. It is a power which this court has described as an 'incident to sovereignty,'—a power which 'belongs to every independent government'."

This brings us to the question of whether or not the defendants were authorized as representatives of the State of Virginia to take the property of the plaintiff-in-error referred to in the case at bar.

Clause 21 of Section 911-a of the Code of Virginia, Vol. 1, p. 418, reads as follows:

"The superintendent of roads shall cause the roads of his county to be kept cleared, smoothed of rocks and obstructions, of necessary width, well drained, and otherwise in good order, and secure from the falling of dead timber thereon. He shall cause to be placed and kept across every stream where it is necessary and practicable a sufficient bridge, bench, or log for the accommodation of foot passengers. *He may take from the most convenient lands so much wood, stone, gravel, or earth as may be necessary to be used in constructing or repairing any road, bridge or causeway therein;* he shall take such earth from the most convenient and the nearest place so as to save the expense of hauling such earth any distance, and, for the purpose of draining the road, may cause a ditch to be cut through the lands adjoining the same: provided, such wood and other materials be not taken from, and such ditch

be not cut through any yard, or garden without the consent of the owner, and provided said superintendent shall not cut, deface, or destroy any fruit trees nor any ornamental trees planted or left for ornament or shade, nor any hedge planted or left as a protection to cattle; provided, further, that the same does not in any wise interfere with travel along said road." (Italics supplied).

The direct authority under which the defendants in the case at bar were acting is found in Section 2, Chapter 174 of the Acts of Assembly, 1914, p. 286, which reads as follows:

"There shall be a road board in each magisterial district composed of the supervisor of the district and two commissioners of roads, who shall be elected by the people, at the same time that the supervisors of the county are elected, and shall hold office for four years; *and shall have all the rights, powers and authority as are given to the superintendents of roads under the general laws of the State;* provided, however, that the first commissioners of roads to act under provisions of this act shall be appointed by the judge of the circuit court of Lunenburg county, in term time and shall receive the same pay as is allowed to a supervisor; but the salary of the district road commissioners shall not exceed the sum of fifty dollars per year each. All road commissioners appointed or elected under this first act shall give a bond in the penalty of five hundred dollars for the faithful performance of their duties as said road commissioners, which said bond shall be approved by the judge of the circuit court in term time or vacation." (Italics supplied).

It will be seen from a reading of Section 2, Chapter 174, *supra*, that the Road Board in question, by that act, is vested with all the rights, powers and authority that are given to the superintendents of roads under the general laws of the State, so that reading Section 2 of Chapter 174, *supra*, in connection with Clause 21 of Section 911-a of the Code of Virginia, *supra*, it becomes evident that the defendants were properly authorized in the case at bar to take the soil in question from the land of the plaintiff-in-error.

Counsel for the plaintiff-in-error, on p. 6 of his brief, attempts to distinguish between a superintendent of roads, such as is provided for in Clause 21 of Section 911-a and the Road Board referred to in the case at bar, acting under authority of Section 2, Chapter 174. We most earnestly contend that by

reading Clause 21 of Section 944-a and Section 2 of Chapter 174 above referred to, the Legislature plainly intended to invest such Road Board *with all the rights, powers and authority that are given to superintendents of roads under the general laws of the State.*

The attention of the court is directed to the fact that nowhere in the brief of counsel for plaintiff-in-error is it denied that the defendants were acting as agents of the State of Virginia through the said Road Board when they entered upon the lands of the plaintiff-in-error and took therefrom the soil in question.

It will be seen that Clause 21 of Section 944-a of the Code of Virginia authorizes the superintendent of roads to take from the most convenient lands *so much wood, stone, gravel or earth as may be necessary to be used in constructing or repairing any road, bridge or causeway.* The defendants in the case at bar were acting directly under the authority conferred by this section.

## AN ADEQUATE METHOD IS PROVIDED FOR OBTAINING COMPENSATION FOR THE PROPERTY TAKEN.

Section 1, of Article 14 of the Constitution of the United States, provides, among other things, that

> "No State * * * shall deprive any person of life, liberty or property without due process of law."

A similar provision is found in Section 58 of the Constitution of Virginia, which provides, in part, that

> "It (the General Assembly) shall not enact any law whereby private property shall be taken or damaged for public uses without just compensation."

The point in this case, therefore, is narrowed down to the single question as to whether or not compensation must be made for private property taken for public use *before the actual taking of the same.*

The provision contained in the statute law of Virginia for making compensation in the case at bar, is found in Clause 22, Section 944-a, of the Code of Virginia, Vol. 1, p. 449, which reads as follows:

"If the owner or tenant of any such land shall think himself injured thereby, and the superintendent of roads, or his deputy can agree with such owner as to the amount of damage, they shall report the same to the board of supervisors, or, if they cannot agree, a justice, upon application to him, shall issue a warrant to three freeholders, requiring them to view the said land, and ascertain what is a just compensation to such owner or tenant for the damage to him by reason of anything done under the preceding section. The said freeholders, after being sworn according to the provisions of section three of this act, shall accordingly ascertain such compensation and report the same to the board of supervisors. Said board may allow the full amount so agreed upon, or reported by said freeholders, or so much thereof as upon investigation they may deem reasonable, subject to such owner or tenant's right of appeal to the circuit court as in other cases."

Clause 22 of Section 94-a of the Code of Virginia, which is set out in full above, provides an adequate remedy, and a reasonable and convenient method for the recovery by the land owner of such compensation for such private property as may have been taken for public use. The statute provides that the superintendent of roads, or his deputy, can agree with the landowner as to the amount of damages, or that, if they cannot agree, a justice, upon application to him, shall issue his warrant to three freeholders, requiring them to view the said land, ascertain what is just compensation to such owner or tenant for damage to him by reason of the taking of the soil, and report the same to the Board of Supervisors. The Board of Supervisors may allow the full amount so agreed upon by the said freeholders, or so much thereof as upon investigation the said Board of Supervisors may deem reasonable, *subject to such owner's or tenant's right of appeal to the circuit court as in other cases, and as a matter of right to the Supreme Court of Appeals of Virginia.*

## STATE STATUTES ARE PRESUMED TO BE CONSTITUTIONAL

The constitutionality of a statute is presumed, and every presumption must be indulged in favor of its validity. *House Telephone Co. v. Los Angeles, et als*, 211 U. S. 152, 53 L. Ed. 123. Justice Moody, in delivering the opinion of the court, said:

"* * * Every presumption should be indulged in favor of the constitutionality of the legislation. In *Secat* v. *Rechel*,

159 U. S. 380, 392, 40 L. Ed. 188, 16 Sup. Ct. Rep. 43, 46, it was said: 'But, in determining whether the legislature in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid unless it can be clearly shown to be in conflict with the Constitution. It is a well-settled rule of constitutional exposition that, if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed'."

## NO NOTICE OR HEARING UPON THE EXPEDIENCY OR NECESSITY OF THE TAKING OF PRIVATE PROPERTY FOR PUBLIC USE IS REQUIRED.

Counsel for the plaintiff-in-error relies on the fact that, before the property was taken, there was no opportunity afforded the plaintiff-in-error to contest the justice, necessity or correctness of the taking, and lays great stress on the fact that the property in question was taken without notice or hearing, upon the expediency or necessity of taking the property for public use. In our view of the case, no such opportunity was required, so long as the plaintiff-in-error was provided a complete and adequate remedy whereby he could obtain a just, fair and reasonable compensation for so much of his soil as was used by the said Board Board.

In the well considered case of *Mary I. Lancaster, Trustee*, v. *Augusta Water District*, 108 Maine, p. 137, Judge Peabody, speaking for the court on this point, says:

> "The law which governs notice in eminent domain proceedings recognizes equally the right of the public and of the owner, and the requirement of personal notice to the owner in every case of the taking would be inexpedient and unreasonable. The title might be uncertain, the owners absent, numerous or unknown, and their interests in the property different. It has, therefore, been decided that notice by publication or by posting, is sufficient, even in respect to persons residing within the jurisdiction where the proceedings are pending. *Wilson* v. *Hathaway*, 42 Iowa, 173; *McIntire* v. *Marine*, 93 Ind. 193; but the constitutional requirement will be satisfied by giving a reasonable notice, the standard being that it must be such as to afford the persons interested an opportunity to be heard upon matters affecting their private rights. The owners, being themselves part of the public

whose interests are paramount, are not entitled to notice or a hearing upon the expediency or necessity of taking the property for public use: *Hanley* v. *Park Shore Water Co.*, 91 Maine, 80; *Benton* v. *Gerald*, 100 Maine, 351; *Holt* v. *Somerville*, 127 Mass. 408; *Old Colony Railroad*, 163 Mass., 356; but after the seizure they are entitled to be heard upon all proceedings. *Kennebec Water District* v. *Waterville*, 96 Maine, 234; *Winslow* v. *Rutledge*, 23 U. S. 271; *Baltimore Belt R. R. Co.*, 75 Md. 94; *Penny* v. *Corse*, 58 N. Y. 143; *Woodruff* v. *Taylor*, 20 Vt. 65; *Cooley Const. Lim.*, 7 Ed. 709. The case of *Appleton* v. *Newton*, 148 Mass. 216, upholds the constitutionality of statutes somewhat similar to those which are the foundation of the proceedings in this case, and the question of notice is there exhaustively discussed. The court, by Knowlton, J., says: "It does not follow that personal service of a paper or a formal notice of any kind is necessary. The taking of land for a public use is strictly a proceeding in rem, the res being within the jurisdiction of the State. In all such cases it is enough if there is such a notice as makes it reasonably certain that all persons interested who easily can be reached will have information of the proceedings, that there is such a probability as reasonably can be provided for, that those at a distance also may be informed. It is for the Legislature, within proper limitations, to say what means of knowledge will be enough to put upon a landowner the duty, within a prescribed time, to take measures to obtain his compensation if he wishes to save his rights."

In the case of the *Crozier* v. *Fried. Krupp Aktiengesellschaft*, decided by this court in 1912, 224 U. S. p. 290, 56 L. Ed. 771, relied on under point to the one involved in the case at bar, Mr. Chief Justice White, in delivering the opinion of the court, says, on p. 305:

"This being the substantial result of the statute, it remains only to determine whether its provisions are adequate to sustain and justify giving effect to its plain and beneficent purpose to broaden additional protection to owners of patents when their rights are infringed by the officers of the government in the discharge of their public duties. This inquiry may be solved, under the conditions here involved, by taking the most exciting aspect of the well-established and indeed elementary requirements in favor of property rights essential to be afforded in order to justify the taking by government of private property for public use. Indisputably the duty to

make compensation does not inflexibly, in the absence of constitutional provisions requiring it, exact, first, that compensation should be made previous to the taking,—that is, that the amount should be ascertained and paid in advance of the appropriation,—it being sufficient, having relation to the nature and character of the property taken, that adequate means be provided for a reasonably just and prompt ascertainment and payment of the compensation: second, that, again, always having reference to the nature and character of the property taken, its value and the surrounding circumstances, the duty to provide for payment of compensation may be adequately fulfilled by an assumption on the part of the government of the duty to make prompt payment of the ascertained compensation,—that is, by the pledge, either expressly or by necessary implication, of the public good faith to that end."

## COMPENSATION NEED NOT BE PAID IN ADVANCE OF THE TAKING.

So far as the Federal Constitution is concerned, it is well settled by repeated decisions that a State may authorize the taking of possession of private property for public use prior to any payment or even before final determination of the amount of compensation to be paid, so long as the owner is provided with a method whereby he can obtain just and reasonable compensation.

In the case of *Williams* v. *Parker*, 188 U. S. 491, 47 L. Ed. 560, where the Legislature of the State of Massachusetts passed an act prohibiting certain buildings in certain portions of the city of Boston from exceeding ninety feet in height, Section 1 of the 14th Amendment of the Constitution of the United States was drawn into question. Mr. Justice Brewer, on p. 502, on the question as to whether or not payment must be made prior to the taking of possession, says:

> "So far as the Federal Constitution is concerned, it is settled by repeated decisions that a State may authorize the taking of possession prior to any payment, or even final determination of the amount of compensation. In *Backus* v. *Ft. Street Union Depot Co.*, 169 U. S. 557, 568, 42 L. Ed. 853, 858, 18 Sup. Ct. Rep. 445, 449, we said:
>
> 'Is it beyond the power of a State to authorize in condemnation cases the taking of possession prior to the final determination of the amount of compensation and payment thereof? This question is fully answered by the opinions of this court in *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 34 L. Ed. 295, 10 Sup. Ct. Rep. 965, and *Sweet*

v. *Rechel*, 159 U. S. 380, 40 L. Ed. 188, 16 Sup. Ct. Rep. 43. There can be no doubt that if adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to the amount which must be paid and before any final determination thereof."

In the recent case of *Mt. Vernon Woodberry Cotton Duck Co., et al* v. *Alabama Interstate Power Co.*, 240 U. S. 30, 33, Mr. Justice Holmes cited with approval the case of *Williams* v. *Parker*, *supra*, and said:

"We see nothing that runs against the 14th Amendment. The right given to take possession before the compensation is finally determined also is not argued. *Williams* v. *Parker*, 188 U. S. 491, 502, 47 L. Ed. 559, 562, 23 Sup. Ct. Rep. 440."

On the question as to whether or not compensation must be paid in advance of the taking of private property for public use, we beg to refer to the case of *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 34 L. Ed. 295. Mr. Justice Harlan, in delivering the opinion of the court, says:

"It is further suggested that the Act of Congress violates the Constitution in that it does not provide for compensation to be made to the plaintiff before the defendant entered upon these lands for the purpose of constructing its roads over them. This objection to the Act cannot be sustained. The Constitution declares that private property shall not be taken 'for public use without just compensation.' It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed. Whether a particular provision be sufficient to secure the compensation to which, under the Constitution, he is entitled, is sometimes a question of difficulty. In the present case, the requirements of the Constitution have, in our judgment, been fully met. The third section provides that before the railway shall be constructed through any lands proposed to be taken, full compensation shall be made to the owner for all property to be taken or damage done by reason of the construction of the road. In the event of an appeal from the finding of the referees, the Company is required to pay into court double the amount of the award, to

abide its judgment: and, that being done, the Company may enter upon the property sought to be condemned, and proceed with the construction of its road. We are of the opinion that this provision is sufficiently reasonable, certain and adequate to secure the just compensation to which the owner is entitled.

"The plaintiff asks, What will be its condition, as to compensation, if, upon the trial *de novo* of the question of damages, the amount assessed in its favor should exceed the sum which may be paid into court by the defendant? This question would be more embarrassing than it is, if, by the terms of the Act of Congress, the title to the property appropriated passed from the owner to the defendant, when the latter—having made the required deposit in court—is authorized to enter upon the land, pending the appeal, and to proceed in the construction of its road. *But, clearly, the title does not pass until compensation is actually made to the owner. Within the meaning of the Constitution, the property, although entered upon, pending the appeal, is not taken until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner.* Such was the decision in *Kennedy* v. *Indianapolis*, 103 U. S. 599, 604 (26: 550, 553), where the court construed a clause of the Constitution of Indiana, declaring that no man's property 'shall be taken or applied to public use, * * * without a just compensation being made therefor,'—substantially the provision found in the National Constitution. *This court there said that 'on principle and authority the rule is, under such a Constitution as that of Indiana, that the right to enter on and use the property is complete as soon as the property is actually appropriated under the authority of law for a public use, but that the title does not pass from the owner without his consent until just compensation has been made to him.* In the case now before us the property in respect to which the referees made the award will be conditionally appropriated for the public use when the defendant makes a deposit in court of double the amount of such award, and it only remains to fix the just compensation to be made to the owner. But the title has not passed, and will not pass, until the plaintiff receives the compensation ultimately fixed by the trial *de novo* provided for in the statute. * * *" (Italics supplied.)

On the same point, in the case of *Sweet* v. *Rechel*, 159 U. S. 380, 40 L. Ed. 197, Mr. Justice Harlan, in delivering the opinion of the court, said:

"In view of these authorities, it is clear that as the constitution of Massachusetts does not require compensation to be first actually made or tendered before the rights of the public in the property taken or applied become complete, the requirements of that instrument are fully met where the statute makes such provision for reasonable compensation as will be adequate and certain in its results. It is equally clear that an adequate provision is made when the statute, authorizing a public municipal corporation to take private property for public uses, directs the regular ascertainment, without improper delay and in some legal mode, of the damages sustained by the owner, and gives him an unqualified right to a judgment for the amount of such damages which can be enforced, that is, collected, by judicial process.

"Substantially the same principles have been announced by this court when interpreting the clause of the Constitution of the United States that forbids the taking of private property for public use without just compensation. In *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 658 (34: 295, 302), it was suggested that the Act of Congress there involved violated the Constitution of the United States in that it did not provide for compensation to be made to the plaintiff before the defendant entered upon lands taken for the purpose of constructing its road over them. This objection was not sustained. * * *

"* * * After referring to adjudged cases in that and other States, this court, speaking by *Chief Justice* Waite, said:

'Not to multiply cases further, it seems to us that both on principle and authority the rule is, under such a constitution as that of Indiana, *that the right to enter and use the property is complete as soon as the property is actually appropriated under the authority of law for a public use, but the title does not pass from the owner without his consent until just compensation has been made to him.*'

"But that case by no means controverts the doctrine that the legislature may authorize a municipal corporation to take, for public use, *at the outset, the absolute title to specific private property, if either the statute under which that is done, or a general statute, recognizes the absolute right of the owner, upon his property being taken, to just or reasonable compensation therefor, and makes provision, in the event of the disagreement of the parties, for the ascertainment, by suit, without unreasonable delay or risk to the owner, of the compensation to which, under the constitution, he is entitled*, and

to a judgment in his favor, enforceable against such corporation in some effective mode, so that the owner can certainly obtain the amount of such compensation. * * *"

* * * * * * * * *

"We are of opinion that, upon both principle and authority, it is competent for the legislature, in the exercise of the police powers of the Commonwealth, and of its power to appropriate private property for public uses, to authorize the city to take the fee in the lands described in the statute, prior to making compensation, and that the provision made for compensating the owner was certain and adequate.

"It results that as the title to the lands here in question passed to the city of Boston when such lands were actually taken in the mode prescribed in the statute of 1867, the persons who were then the owners, whoever they were, had thereafter no interest in them, but were only entitled to reasonable compensation." (Italics supplied).

On the same point, in *A. Backus, Jr. & Sons* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 42 L. Ed. 853, Mr. Justice Brewer, in delivering the opinion of the court, says:

"* * * The argument is that the property owner has a constitutional right to have the amount of his compensation finally determined and paid before yielding possession; that the party seeking condemnation (in this case the Depot Company) cannot be let into possession until after all question as to the compensation has been finally settled, and the amount thereof paid; that it cannot take advantage of one report or verdict, pay the sum fixed by it, obtain possession, and still litigate the question of amount; that if it does then pay and take possession its right to further litigate is ended. But the supreme court of the State held against this contention, and we must assume therefrom that it is not warranted by the Constitution and statutes of the State. Indeed, the language of that Constitution is, 'made or secured.' Does this amount to a denial of the right that protection to property which is guaranteed by the 14th Amendment to the Federal Constitution? In other words, is it beyond the power of a State to authorize in condemnation cases the taking of possession prior to the final determination of the amount of compensation and payment thereof? This question is fully answered by the opinions of this court in *Cherokee Nation* v. *Southern Kansas*

*Railway*, 135 U. S. 641 (34:295), and *Sweet* v. *Rechel*, 159 U. S. 380 (40:188). There can be no doubt that if adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to the amount which must be paid and before any final determination thereof.

"Neither can it be said that there is any fundamental right secured by the Constitution of the United States to have the questions of compensation and necessity both passed upon by one and the same jury. In many States the question of necessity is never submitted to the jury which passes upon the question of compensation. It is either settled affirmatively by the legislature, or left to the judgment of the corporation invested with the right to take property by condemnation. The question of necessity is not one of a judicial character, but rather one for determination by the lawmaking branch of the government. *Mississippi & Rum River Boom Co.* v. *Patterson*, 98 U. S. 403, 406 (25:206, 208); *United States* v. *Jones*, 109 U. S. 513 (27:1015); *Cherokee Nation* v. *Southern Kansas Railway Company*, *supra*."

It is not denied that it is a condition precedent to the exercise of eminent domain or the taking of private property for public use that there be a statute in existence which makes provision for reasonable compensation to the owner, *but the time at which the compensation for private property taken for public use is to be paid depends upon the constitutional and statutory provisions of the government under which it is taken.* The due process clause of Section 1 of Article 14 of the Constitution of the United States is complied with if the owner is provided with a reasonable, certain and adequate remedy for obtaining compensation. There could be no good reason why the compensation for the soil taken in the case at bar should have been ascertained and paid before the defendants entered upon the lands of the plaintiff-in-error, and such a course could only have caused delay in repairing the public highway in question. If it were necessary that notice should be given and the amount of compensation ascertained in all cases before the taking of private property for public use, especially where the taking is for the purpose of improving the highway, the State of Virginia would be very seriously hampered and very often unnecessarily delayed in rebuilding and repairing her highways, because in many cases the owners of land cannot be known, or might be non-residents of the State of Virginia. As we have heretofore shown, it has been repeatedly

held that compensation need not be paid in advance of the occupancy of the land to be taken.

The well settled doctrine in the United States is, that under the power of eminent domain vested in the States, private property can only be taken for a public use; and the decided cases leave the question of what is a public use in the sound discretion of the law making bodies of the several States. It is not a judicial question.

Where private property is taken, as in the case at bar, for the use of the public highways of the State, there can be no question that the use is public. The right to determine whether or not an appropriation of private property may be applied to a particular use, is vested in the Legislature.

In *Shoemaker* v. *United States*, 147 U. S. 282, 37 L. Ed. 184, the court said:

> "The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the Legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmati e, the judicial function is exhausted: that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, *subject only to the restraint that just compensation be made*." (Italics supplied).

In *Tait's Ex'or.* v. *Central Lunatic Asylum*, 84 Va. 271, on the question of the taking of private property for public use, Lewis P., in delivering the opinion of the court, where the point was raised that the necessity for such taking must be shown, said:

> "The answer, however, to this position is, that the property sought to be condemned being intended for a public use, the necessity for its appropriation is not a subject of judicial cognizance, *but belongs exclusively to the legislature. Roanoke City* v. *Berkowitz*, 80 Va. 616." (Italics supplied.)
>
> Followed in *Zirkle* v. *Southern Ry. Co.*, 102 Va. 22.

It is said that if the legislative power has adjudged of the necessity which authorizes the taking of private property for public use, it is under a double necessity, and rightly so, to provide for the payment of just compensation. As we have heretofore pointed out, the property in question in the case at bar was taken under valid legislative enactment, and there was provided for the

plaintiff-in-error, *a complete and adequate remedy at law whereby he could recover just compensation for so much of his land as had been taken or damaged.* We most earnestly contend that the procedure provided for in Causes 21 and 22 of Section 944-a of the Code of Virginia, meets every requirement of Section 1 of the Fourteenth Amendment of the Constitution of the United States, regarding due process of law.

It is true that the question of compensation is a judicial one, and it must be determined by some kind of a tribunal capable of making a decision after notice and hearing. All that is required is that such a hearing shall be conducted in some fair and just manner with ample opportunity to the owner of the property to produce evidence as to its value and to be heard thereon.

The statute under review in the case at bar, as we have heretofore shown, provides that the owner of the land may agree with the superintendent of roads as to the amount of his damages, and that if they cannot agree, a justice, upon application to him, is directed to issue a warrant to three free holders requiring them to view the said land and ascertain what is a just compensation to be paid to the owner for the damage to his property by reason of the taking of the top soil in question. The said free holders are required to be sworn before ascertaining such compensation and making a report to the board of supervisors.

It will be seen that the statute here provides that three free holders who are presumed to be fair and impartial, after being first duly sworn to the performance of their duty, ascertain and report to the board of supervisors such compensation as in their judgment, the owner is entitled to. If the owner had no further rights than this, there might be some complaint that his property was being taken without due process of law, but the statute does not stop there. It further provides that the board of supervisors may allow the full amount agreed upon by the said free holders, or so much thereof as upon investigation, they might deem reasonable, subject, however, to *such owner's or tenant's right of appeal to the circuit court, as in other cases, and as a matter of right to the Supreme Court of Appeals of Virginia.* The statute in question is partial to the land owner, in that an appeal is *allowed him*, and *denied the State of Virginia.*

We most earnestly contend that it would have been highly impracticable and absolutely impossible in the case at bar to have ascertained the compensation to be paid for the taking of the soil in question before the actual taking thereof. In the first place there has been no actual taking of the property of the plain-

tiff-in-error, so that he can claim damages for the fee simple estate. We admit that he may have a right of action for damages for so much of the soil as has been removed, but not for the fee simple value of the property. The Road Board could not have known beforehand just how much of the soil would be needed from the land of the plaintiff-in-error and not knowing this, no *just compensation* could have been agreed upon in advance of the actual taking. The *title* to the property of the plaintiff-in-error has not been disturbed and under the decisions of this court does not pass until compensation has been paid.

## REVIEW OF CASES RELIED ON BY COUNSEL FOR PLAINTIFF-IN-ERROR.

Counsel for plaintiff-in-error cites in his brief, on p. 6, the case of *Home Telephone & Telegraph Co.* v. *City of Los Angeles, et als, supra*, and inserts therein the following quotation, purporting to have been taken from that case:

> "1. The prohibitions and guaranties of the U. S. Const. 14th Amend., are addressed to, and control, not only the States, but also every person, whether natural or judicial, who is the respository of State power."
>
> "2. A case where one in possession of State power uses that power to the doing of wrongs which are forbidden by U. S. Const., 14th Amend., is within the purview of that Amendment, even though the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the State authority lodged in the wrongdoer."

We have examined this case, but nowhere in the opinion of Justice Moody do we find the language attributed to him. Even though the language quoted in the brief of plaintiff-in-error on p. 6, was taken from Justice Moody's opinion, we contend there is nothing in the statements therein contained which would affect this question. We do not deny that the prohibitions and guaranties of the United States Constitution are addressed to and control ont only the States but also every person who is a repository of State power, nor do we deny that when one is in possession of State power, and uses that power to the doings of wrongs which are forbidden by the 14th Amendment of the United States Constitution, he is within the purview of that amendment. On the other hand, we agree absolutely with every word in the state-

ments attributed to Justice Moody, and quoted in the brief of the plaintiff-in-error. That case was one growing out of certain alleged fixing of telephone rates by an ordinance of the City of Los Anegles. The appellants in that case contended that the ordinance fixing the rates was wanting in due process of law, and, therefore, violated the 14th Amendment of the Constitution of the United States, because Section 31 of the charter under which authority they were enacted did not expressly provide for notice and hearing before action. The court said in the course of its opinion that rate regulations are purely a legislative function, and even where exercised by a subordinate body the notice and hearing essential in judicial proceedings and, for peculiar reasons, in some forms of taxation, would not seem to be indispensable. An ordinance of the city provided that the rates should be fixed at a regular meeting of the City Council, and another ordinance of the city required the Telephone Company to render annually to the City Council a statement of its receipts and expenditures, the property employed in business, and facts which would be material on the question of fixing reasonable rates. The court said on this point, page 279:

> "This shows that a sufficient notice and hearing were afforded to the appellants if it had chosen to avail itself of them, instead of declining to furnish all information as it did. If notice and opportunity to be heard were indispensable, which we do not decide, it is enough that, although the charter be silent, such notice and hearing were afforded by ordinance as in this case."

From a careful reading of this case, it is evidently not applicable to the case at bar, from the viewpoint of the plaintiff-in- error. It rather tends to sustain our contention.

Counsel for the plaintiff-in-error also relies on the case of *Soliah, et als* v. *Eskin, et als*, 222 U. S. 522. In that case the statute of North Dakota provided (on the petition of six persons owning land to be affected, or of a sufficient number to show the public demand where a drainage was intended to benefit a township) for the holding of a preliminary examination by a drainage board appointed by county commissioners. The court held that the 14th Amendment to the Constitution of the United States did not invalidate the act. In that case, notice was given and opportunity to be heard was afforded the land owner before any assessment became a lien against the property. This case has no application to the case at bar, because, in that case, if the

drainage board had been permitted to act without notice, it would have, in effect, permitted all the property owners in the township affected, to have been bound by a petition of six persons. Whereas, in the case at bar, the taking was for the public use by the State of Virginia for the benefit of all of its citizens, and not six, as was the fact in the case above referred to.

Counsel for the plaintiff-in-error, on p. 9 of his brief, cites and relies on the case of *Eubank* v. *City of Richmond*, 226 U. S. 137. This case is somewhat similar to the case of *Soliah, et als* v. *Eskin, et als, supra*. The ordinance drawn in question in the case of *Eubank* v. *City of Richmond, supra*, provided that whenever the owners of two-thirds of the property abutting on any street should, in writing, request the committee on streets to establish a building line on the side of the square on which their property fronted, *the street committee should establish such line*. A building line was established, and Eubank was ordered to remove certain portions of his building to conform to the city line. The question at issue in that case was not one of due process of law, but one of the police powers of the City of Richmond. The court, in that case, declared the ordinance unconstitutional as an improper exercise of the police power of the city and because Eubank had at no time an opportunity to be heard. This case, likewise, has no application to the case at bar.

In the case of *Embree, et als* v. *Kansas City & Liberty Boulevard Road District, et als*, 240 U. S. 242, cited and relied on by counsel for plaintiff-in-error on p. 10 of his brief, presents the question of the creation of a new road district, the cost of which was to be borne temporarily by the issuance and sale of bonds, and ultimately by the levying and collection of certain taxes upon all the lands in the district. In that case, it will be seen that the statute required that adequate public notice be given of the presentation of the petition for the creation of the district and the time when it would be considered. That a hearing of some kind was contemplated was obvious and was conceded. The court, in concluding its opinion, says:

> "* * * While no hearing is given when the lands are appraised, one is accorded when the tax is sought to be enforced. * * *"

That case differs from the case at bar in that the statute under consideration provided notice, whereas the statute in the case at bar does not contemplate that notice should be given before the actual taking of the soil in question.

Counsel for the plaintiff-in-error cites and relies on the case of *St. Louis & Kansas City Land Co.* v. *Kansas City*, 241 U. S. 419; 60 L. Ed. 1072. In that case the city condemned certain land and later imposed an assessment upon property owners who owned property in the benefit district to pay for the condemned land. The question presented was whether the owners of property in the benefit district who had been assessed for benefits to pay an award for property condemned should have been parties to the condemnation proceedings. The court, speaking through Mr. Justice Hughes, says:

> "It is also well settled that an owner of property which may be assessed for benefits in order to pay an award for property condemned is not entitled, by virtue of the 14th Amendment, to insist upon being made a party to the condemnation proceeding, or to be heard with respect to the amount of the award. He may not demand, as a Federal Right, that the power of eminent domain shall not be exercised save upon notice to him. *Voigt* v. *Detroit*, 184 U. S. 115, 122, 46 L. Ed. 459, 462, 22 Sup. Ct. Rep. 337; *Goodrich* v. *Detroit*, 184 U. S. 432, 437, 438; 46 L. Ed. 627, 630, 631, 22 Sup. Ct. Rep. 397; *Londoner* v. *Denver*, 210 U. S. 373, 378, 52 L. Ed. 1103, 1109, 28 Sup. Ct. Rep. 708. As well might it be argued, as was suggested in *Goodrich* v. *Detroit*, supra, that whenever the city contemplated a public improvement of any description, it would be necessary to give notice to all those who might be taxed to pay for it. * * *"

We are unable to see that this case sustains any view taken by counsel for the plaintiff-in-error.

The case of *Garfield* v. *United States, ex rel Goldsby & Allison*, 211 U. S. 249, 53 L. Ed. 168, is not applicable to the case at bar. In that case Goldsby was an original enrolled member of a certain Indian tribe. He selected certain land and received a certificate of allotment from the Dawes Commission. Subsequently, the Secretary of the Interior caused to be entered opposite the entry "Cancelled March 4, 1907." The action of the Secretary of the Interior was declared to be *ultra vires*, and this court in disposing of the case, said:

> "* * * But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and, if the Secretary has exceeded the authority conferred upon him by law, then there

is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

It will be seen that this case likewise fails to sustain the position of counsel for the plaintiff-in-error.

The case of *Hagar* v. *Reclamation District No.* 108, 111 U. S. 701, 28 L. Ed. 569, does not sustain the position of counsel for the plaintiff-in-error. In that case the court said:

> "* * * The assessment under consideration could, by the law of California, be enformed only by legal proceedings, and in them any defense going either to its validity or amount could be pleaded. In ordinary taxation assessments, if not altered by a board of revision or of equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property; but assessments in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suits, and, of course, to their validity it is essential that notice be given to the taxpayer and opportunity be afforded him to be heard respecting the assessment. In them he may set forth, by way of defense, all his grievances. *Reclamation District No.* 108 v. *Evans*, 61 Cal., 104. If property, taken upon an assessment, which can only be enforced in this way, be not taken by due process of law, then, as said by *Mr. Justice* Miller, in the New Orleans Case, these words, as used in the Constitution, can have no definite meaning. * * *"

We most earnestly contend that none of the cases cited and relied on by counsel for the plaintiff-in-error hold contrary to our contention in the case at bar.

Sustained by the decided cases, we earnestly submit that the Circuit Court of Lunenburg County, Virginia, was without error in dissolving the injunction and dismissing the bill of complaint, and that the Supreme Court of Appeals of Virginia was without error in refusing an appeal in the case at bar, because the soil of the plaintiff-in-error was taken for public use under authority of Clause 21 of Section 944-a of the Code of Virginia, and Section 2 of Chapter 174, Acts of Assembly, 1914, p. 280, both of which are constitutional, and because by Clause 22 of Section 944-a of the Code of Virginia, the plaintiff-in-error is provided with a complete and adequate remedy whereby he can obtain just, reasonable and adequate compensation for so much of his property as may have been taken or damaged.

For these reasons, we submit that the decrees herein complained of should not be disturbed.

JNO. R. SAUNDERS,
*Attorney General of Virginia.*

J. D. HANK, JR.,
*Assistant Attorney General of Virginia.*

F. B. RICHARDSON,
*Law Assistant.*

N. S. TURNBULL, JR.,
*Commonwealth's Attorney of Lunenburg Co.*

December 1, 1918.

Counsel for Parties.

# BRAGG *v.* WEAVER ET AL.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 22. Argued October 13, 1919.—Decided December 8, 1919.

The necessity or expediency of taking property for public use are legislative questions upon which the owner is not entitled to a hearing under the due process clause of the Fourteenth Amendment. P. 58.

When the amount of compensation is fixed in the first instance by viewers, due process does not demand an opportunity for a hearing before them, if the owner be given notice and opportunity to have the matter fully heard and determined *de novo* in a court of general jurisdiction, on appeal, as is provided by the laws of Virginia in cases where earth is taken from private land for the repair of public roads. P. 59.

Under the law of Virginia (Pollard's Code, 1904, § 944a, clauses 21, 22, 5; § 838), the owner of land from which earth is taken for repairing public roads can initiate the proceedings for assessment of compensation, and is entitled to have notice of the supervisors' determination of the amount, either by notice in writing or through being present when the decision is made; and he is allowed 30 days in which to appeal for a trial *de novo* in the Circuit Court. P. 61.

Where adequate provision is made by a State for the certain payment of the compensation without unreasonable delay, the taking does not contravene due process of law merely because it precedes the ascertainment of what compensation is just. P. 62.

Affirmed.

THE case is stated in the opinion.

*Mr. George E. Allen*, with whom *Mr. John Garland Pollard* was on the briefs, for plaintiff in error.

*Mr. J. D. Hank, Jr.*, Assistant Attorney General of the State of Virginia, with whom *Mr. Jno. R. Saunders*, Attorney General of the State of Virginia, *Mr. F. B.*

*Richardson* and *Mr. N. S. Turnbull, Jr.*, were on the brief, for defendants in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

By this suit the owner of land adjoining a public road in Virginia seeks an injunction against the taking of earth from his land to be used in repairing the road. The taking is from the most convenient and nearest place, where it will be attended by the least expense, and has the express sanction of a statute of the State, Pollard's Code, 1904, § 944a, clauses 21 and 22.[1] Whether the statute denies to the owner the due process of law guaranteed by the Fourteenth Amendment is the federal question in the case. It was duly presented in the state court and, while no opinion was delivered, the record makes it plain that by the judgment rendered the court resolved the question in favor of the validity of the statute.

It is conceded that the taking is under the direction of public officers and is for a public use; also that adequate provision is made for the payment of such compensation as may be awarded. Hence no discussion of these matters is required. The objection urged against the statute is that it makes no provision for affording the owner an opportunity to be heard respecting the necessity or expediency of the taking or the compensation to be paid.

Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the State may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment. *Boom Co.* v. *Patterson*, 98 U. S. 403, 406;

[1] Other enactments of March 12, 1912, c. 151; March 21, 1914, c. 174, and March 17, 1916, c. 279, make the statute specially applicable here, but they require no particular attention.

*Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 568; *Adirondack Ry. Co.* v. *New York*, 176 U. S. 335, 349; *Sears* v. *Akron*, 246 U. S. 242, 251.

But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard. Among several admissible modes is that of causing the amount to be assessed by viewers, subject to an appeal to a court carrying with it a right to have the matter determined upon a full trial. *United States* v. *Jones*, 109 U. S. 513, 519; *Backus* v. *Fort Street Union Depot Co.*, *supra*, p. 569. And where this mode is adopted due process does not require that a hearing before the viewers be afforded, but is satisfied by the full hearing that may be obtained by exercising the right to appeal. *Lent* v. *Tillson*, 140 U. S. 316, 326, *et seq.*; *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526, 537; *Wells, Fargo & Co.* v. *Nevada*, 248 U. S. 165, 168. And see *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 18–30, 45.

With these principles in mind we turn to the statute in question. By clause 21 it authorizes certain officers engaged in repairing public roads to take earth for that purpose from adjacent lands, and by clause 22 it declares:

"If the owner or tenant of any such land shall think himself injured thereby, and the superintendent of roads, or his deputy, can agree with such owner as to the amount of damage, they shall report the same to the board of supervisors, or, if they cannot agree, a justice, upon application to him, shall issue a warrant to three freeholders, requiring them to view the said land, and ascertain what is a just compensation to such owner or tenant for the damage to him by reason of anything done under the preceding section. The said freeholders, after being sworn according to the provisions of section three of this act,[1]

[1] ". . . that they will faithfully and impartially discharge their duty as viewers."

shall accordingly ascertain such compensation and report the same to the board of supervisors. Said board may allow the full amount so agreed upon, or reported by said freeholders, or so much thereof as upon investigation they may deem reasonable, subject to such owner or tenant's right of appeal to the circuit court as in other cases."

The same statute, in clause 5, deals with the compensation to be paid for lands taken for roadways, and in that connection provides that the proprietor or tenant, if dissatisfied with the amount allowed by the supervisors, "may of right appeal to the circuit court of said county, and the said court shall hear the matter *de novo*" and determine and certify the amount to be paid. And a general statute (§ 838), which regulates the time and mode of taking appeals from decisions of the supervisors disallowing claims in whole or in part, provides that the claimant, if present when the decision is made, may appeal to the Circuit Court within thirty days thereafter, and, if not present, shall be notified in writing by the clerk and may appeal within thirty days after service of the notice.

Apart from what is implied by the decision under review, no construction of these statutory provisions by the state court of last resort has been brought to our attention; so for the purposes of this case we must construe them. The task is not difficult. The words employed are direct and free from ambiguity and the several provisions are in entire harmony. They show that, in the absence of an agreement, the compensation is to be assessed primarily by viewers, that their award is to be examined by the supervisors and approved or changed as to the latter may appear reasonable, and that from the decision of the supervisors an appeal lies as of right to the Circuit Court where the matter may be heard *de novo*. Thus, by exercising the right to appeal the owner may obtain a full hearing in a court of justice,—one concededly possessing and exercising a general jurisdiction. An opportunity to have such a

hearing, before the compensation is finally determined, and when the right thereto can be effectively asserted and protected, satisfies the demand of due process.

Under the statute the proceedings looking to an assessment may be initiated by the owner as well as by the road officers. Either may apply to a justice for the appointment of viewers. Thus the owner is free to act promptly and upon his own motion, if he chooses.

But it is contended that where the road officers take the initiative—as they do in many instances—the proceedings may be carried from inception to conclusion without any notice to the owner, and therefore without his having an opportunity to take an appeal. We think the contention is not tenable. It takes into account some of the statutory provisions and rejects others equally important. It is true there is no express provision for notice at the inception or during the early stages of the proceedings; and for present purposes it may be assumed that such a requirement is not even implied, although a different view might be admissible. See *Paulsen* v. *Portland*, 149 U. S. 30. But the provisions relating to the later stage—the decision by the supervisors—are not silent in respect of notice, but speak in terms easily understood. Clauses 5 and 22 taken together provide that the owner, if dissatisfied with the decision, shall have the right to appeal as in other cases. This presupposes that he will have some knowledge of the decision, and yet neither clause states how the knowledge is to be obtained, or when or how the right of appeal is to be exercised. All this is explained, however, when § 838 is examined. It deals with these questions in a comprehensive way and evidently is intended to be of general application. Of course, newly created rights of appeal of the same class fall within its operation unless the legislature provides otherwise. Here the legislature has not provided otherwise, and so has indicated that it is content to have the general statute applied. As before stated, that

statute provides that the claimant, if not present when the supervisors' decision is made, shall be notified thereof in writing and shall have thirty days after such notice within which to appeal. If he be present when the decision is made, he is regarded as receiving notice at that time, and the thirty days for taking an appeal begins to run at once. It is apparent therefore that special care is taken to afford him ample opportunity to appeal and thereby to obtain a full hearing in the Circuit Court.

The claim is made that this opportunity comes after the taking, and therefore is too late. But it is settled by the decisions of this court that where adequate provision is made for the certain payment of the compensation without unreasonable delay the taking does not contravene due process of law in the sense of the Fourteenth Amendment merely because it precedes the ascertainment of what compensation is just. *Sweet* v. *Rechel*, 159 U. S. 380, 402, 407; *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 568; *Williams* v. *Parker*, 188 U. S. 491; *Crozier* v. *Krupp*, 224 U. S. 290, 306. And see *Branson* v. *Gee*, 25 Oregon, 462. As before indicated, it is not questioned that such adequate provision for payment is made in this instance.

We conclude that the objections urged against the validity of the statute are not well taken.

*Judgment affirmed.*